Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Plaintiffs accuse defendants, 16 of the country's largest underwriters and institutional investors, of a vast antitrust conspiracy to manipulate the aftermarket prices of some 900 technology stocks sold in initial public offerings. The Securities and Exchange Commission, relying on this Court's decisions in *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), informed the courts below that application of the antitrust laws here would conflict with and seriously disrupt its regulation of the securities offering process under the Securities Act of 1933 and Securities Exchange Act of 1934. The district court agreed with the SEC that implied antitrust immunity is required and dismissed the complaints. The court of appeals reversed, ruling that immunity is unavailable because Congress did not specifically consider and decide to immunize one practice challenged in the complaints—tie-in agreements allegedly requiring recipients of stock in an IPO to engage in other transactions.

The question presented is:

Whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue.

RULES 14.1 AND 29.6 STATEMENT

In these consolidated cases, respondents (plaintiffs-appellants below) are Mita Aggarwal, Estelle L. Augustine, Tom Barnett, Anupkumar Bhasin, Glen Billing, Joe Braswell, Troy Brooks, Anita S. Budich, Thomas E. Burke, Don K. Burris, Louis Capolino, Jerry Cobb, Max Cohen, Ray L. Cox, Buddy Dukeman, Eileen Dukeman, Joyce Dunn, David Federico, Joe Goldgrab, Robert Grovich, Bob Harper, David Hoffman, Bruce J. Jiorle, H. Wayne Jones, Susan Katz, Glenn Kerr, Irving Lassoff, Roderick Lau, Elizabeth Bates Lester, James W. Lester, Solomon Lissanu, Raymond Litwin, Local 144 Nursing Home Pension Fund, Bill Lucia, Michele Lucia, Robert Malafronte, Binh Nguyen, David Pazarella, Demetrios Petratos, Milton Pfeiffer, Carlos Reeberg, Hans Reihl, Norman Ross, Rachel Schwartz, Mark Sculnick, Edward Seltzer, Kenneth Shives, Farideh Sigari, Efriam Simcha, Henry Sklanowsky, Robert Tarantino, Enrico Tavani, Robert H. Thomas, Anthony Voto, Heinz Wahl, Philip Warner, Matthew Weiner, Michael Weiss, Ross Wiczer, Bert Zauderer, Deming Zhous.

Petitioners (defendants-appellees below) are:

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Comerica, Inc. Comerica, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Van Wagoner Capital Management, Inc. Van Wagoner Capital Management, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Van Wagoner Funds, Inc. Van Wagoner Funds, Inc., a mutual fund entity, has no parent corporations. The following publicly held entities own 10% or more of any of its series of shares: (i) Van Wagoner Small Cap Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp.; (ii) Van Wagoner Emerging Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp. Charles Schwab & Co., Inc. and National Financial Services Corp. holds such shares as broker-dealers on behalf of their underlying customers. No other publicly held company owns 10% or more of the stock of Van Wagoner Funds, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (I)

RULES 14.1 AND 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT 1

A. Plaintiffs' Antitrust Complaints Challenge Commonplace Underwriter Practices At The Core Of SEC Regulatory Authority 2

B. The SEC Explained That These Antitrust Suits Conflict With The Exercise Of Its Regulatory Authority And So Are Barred By This Court's Implied Immunity Precedents 5

C. The District Court Dismissed Plaintiffs' Complaints Under This Court's Implied Immunity Precedents 9

D. The Court Of Appeals Rejected The SEC's Position On Immunity And Reversed 10

REASONS FOR GRANTING THE PETITION 12

I. THE SECOND CIRCUIT IMPROPERLY REJECTED THE EXPERT VIEW OF THE SEC THAT IMMUNITY IS ESSENTIAL HERE TO MAKE THE SECURITIES LAWS WORK 14

TABLE OF CONTENTS–Continued

Page

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND CREATES INTOLERABLE CONFUSION OVER THE SCOPE OF ANTITRUST IMMUNITY ... 19

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Implied Immunity Rulings ... 19

B. The Second Circuit's Decision Creates Serious Confusion Concerning The Criteria For Implied Immunity ... 25

III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT SUBSTANTIAL ADVERSE CONSEQUENCES FOR U.S. SECURITIES MARKETS ... 27

CONCLUSION ... 30

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit ... 1a

APPENDIX B: Opinion of the United States District Court for the Southern District of New York ... 72a

APPENDIX C: Order of the United States Court of Appeals for the Second Circuit Denying Rehearing ... 123a

APPENDIX D: Memorandum Amicus Curiae of the Securities and Exchange Commission, filed in the District Court ... 124a

APPENDIX E: Memorandum of the United States as Amicus Curiae, filed in the District Court ... 159a

TABLE OF CONTENTS–Continued

Page

APPENDIX F: Supplemental Letter Brief of the Securities and Exchange Commission, filed in the District Court 180a

APPENDIX G: Letter Brief of the Securities and Exchange Commission, filed in the Court of Appeals 188a

APPENDIX H: Letter Brief of the United States, filed in the Court of Appeals 199a

APPENDIX I: Statutes and Regulatory Guidance 208a

TABLE OF AUTHORITIES

Cases: **Page**

Austin Mun. Sec. v. *National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) 13, 25, 26

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 29

Central Bank v. *First Interstate Bank*, 511 U.S. 164 (1994) 29

Dura Pharms., Inc. v. *Broudo*, 125 S. Ct. 1627 (2005) 29

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 29

Far East Conf. v. *United States*, 342 U.S. 570 (1952) 30

Friedman v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002) 25

Gordon v. *New York Stock Exch.*, 422 U.S. 659 (1975) ..... *passim*

Harding v. *American Stock Exch.*, 527 F.2d 1366 (5th Cir. 1976) 25

Initial Public Offering Sec. Litig., In re, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) 4, 5

Initial Public Offering Sec. Litig., In re, 227 F.R.D. 65 (S.D.N.Y. 2004) 4

Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977) 29

Schaefer v. *First Nat'l Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975) 26

TABLE OF AUTHORITIES-Continued

Page

Silver v. *New York Stock Exch.*, 373 U.S. 341 (1963) 5, 12, 29, 20

Thill Sec. Corp. v. *New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980) 13, 25, 26

TSC Indus. v. *Northway, Inc.*, 426 U.S. 438 (1976) 29

United States v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975) ..... *passim*

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... *passim*

Statutes, Regulations, and Rules:

15 U.S.C. § 1 2

15 U.S.C. § 13 2

15 U.S.C. § 77b(b) 7, 14

15 U.S.C. § 77e 6

15 U.S.C. § 78c(f) 14

15 U.S.C. § 78i(a) 6

15 U.S.C. § 78j(b) 6

15 U.S.C. § 78o-3(b) 7

15 U.S.C. § 78u-4(a) 29

15 U.S.C. § 78u-4(b) 29

15 U.S.C. § 78w(a) 7, 14, 16

15 U.S.C. § 78bb 29

TABLE OF AUTHORITIES–Continued

Page

National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425 (Oct. 11, 1996) 14

17 C.F.R. § 230.134 6

17 C.F.R. § 230.137 6

17 C.F.R. § 230.138 6

17 C.F.R. § 230.139 6

17 C.F.R. § 230.460 6

17 C.F.R. § 230.461 6

17 C.F.R. § 242.100 6

17 C.F.R. § 242.101 6

17 C.F.R. § 242.102 6

17 C.F.R. § 242.103 6

17 C.F.R. § 242.104 6

17 C.F.R. § 242.105 6

Miscellaneous:

1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2000) 18, 19, 20, 23, 24

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release No. 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ..... *passim*

143 Cong. Rec. 21357 (1997) 28

KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES (1976) 29

TABLE OF AUTHORITIES–Continued

Page

H.R. REP. NO. 73-1383 (1934) 15

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003) 28, 30

1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1998) 2, 3

6 MOORE'S FEDERAL PRACTICE § 26.46[1] (3d ed. 2005) 29

REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS (Aug. 1984) 16

REPORT OF THE SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Part 1 (Apr. 1963) 16

S. REP. NO. 73-792 (1934) 15

S. REP. NO. 94-75, 1975 U.S.C.C.A.N. 179 (1975) 7

SEC Div. of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-In" Agreements for Aftermarket Purchases* (Aug. 25, 2000) 17

SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 19, 1980) 15

SEC Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004) 7, 8, 17, 18

SEC Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004) 7, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners, leading investment banking and asset management firms, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-71a) is reported at 426 F.3d 130. The opinion of the district court (App., *infra*, 72a-122a) is reported at 287 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2005. The court of appeals issued an amended opinion on October 26, 2005. Petitioners filed a timely petition for rehearing en banc on November 2, 2005, which was denied on January 12, 2006. App., *infra*, 123a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. § 1, *et seq.*, Robinson-Patman Act, 15 U.S.C. § 13, Securities Act, 15 U.S.C. § 77a, *et seq.*, Securities Exchange Act, 15 U.S.C. § 78a, *et seq.*, and Securities and Exchange Commission guidance are reproduced at App., *infra*, 208a-233a.

STATEMENT

Plaintiffs are purchasers of stock issued by internet and technology companies during the market "bubble" of the late 1990s. Demanding treble damages, plaintiffs' class action complaint in *Billing* alleges that ten leading investment banks conspired to impose anticompetitive charges on prospective purchasers of shares of stock in some 900 initial public offerings (IPOs) of equity securities and to inflate the price of those securities in the aftermarket. In addition to challenging

this conduct in hundreds of separate actions under the federal securities laws, plaintiffs here claim that the conduct violated section 1 of the Sherman Act, 15 U.S.C. § 1, and various state antitrust laws. App., *infra*, 17a-18a; Consolidated Amended Class Action Complaint ("Am. Compl.") Exh. A.

A separate antitrust class action complaint in *Pfeiffer* v. *Credit Suisse First Boston* is based on the same alleged conduct. *Pfeiffer* alleges that underwriters imposing anticompetitive charges on IPO allocants and institutional investors paying those charges engaged in "commercial bribery" in violation of the Robinson-Patman Act, 15 U.S.C. § 13(c), and that this conduct inflated the prices of stocks. App., *infra*, 18a-20a; *Pfeiffer* Compl. ¶¶ 2-4, 75, 82, 84, 115.

A. Plaintiffs' Antitrust Complaints Challenge Commonplace Underwriter Practices At The Core Of SEC Regulatory Authority.

Plaintiffs' complaints challenge "firm commitment" underwriting—by far "the most prevalent type of underwriting"—in which investment banks form a syndicate to purchase shares from the issuer and then resell those shares to an initial group of institutional and retail investors. 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 327 (3d ed. 1998). Firm commitment underwritings are central to capital formation, raising many billions of dollars each year for U.S. businesses. In a firm commitment IPO—which the Securities and Exchange Commission (SEC) has "plenary authority to regulate" under the federal securities laws—a lead manager assumes responsibility for selling most of the offering. Other syndicate members share the risk of the offering, collect a portion of the underwriting fees, and often receive a portion of the offering to allocate to retail customers. See App., *infra*, 4a-6a, 87a-90a; 1 LOSS & SELIGMAN, *supra*, at 327-346.

An integral part of this collaborative process is the "road show" during which underwriters "build the book" for dis-

tributing the offering. App., *infra*, 6a-7a, 74a. In the weeks before the IPO, company officials and underwriters meet with potential investors, informing them about the issuer and collecting information necessary to determine the appropriate size, price, and allocation of the offering. 1 LOSS & SELIGMAN, *supra*, at 341; *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Release No. 34-51500, 70 Fed. Reg. 19672, 19674-19675 (Apr. 13, 2005), App., *infra*, 223a-225a ("*IPO Allocations Release*"). Underwriters' discussions with potential IPO buyers during this process, the SEC has explained, legitimately include "[w]hether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as 'flipping')," "[t]he customer's desired long-term future position in the security," and the "prices at which the customer might accumulate that position." *IPO Allocations Release*, App., *infra*, 225a; see App., *infra*, 7a, 90a-93a, 133a-134a.

Plaintiffs launch an "indiscriminate assault" on this system of capital formation. App., *infra*, 91a. Plaintiffs find an antitrust conspiracy in underwriters' joining together in syndicates to share the risk of an offering. Am. Compl. ¶¶ 37-38. They complain that syndicate members made inquiries "concerning the number of shares [a customer] would be willing to purchase in the aftermarket and the prices such person would be willing to pay." *Id.* ¶¶ 45, 54. They take issue with syndicate members sharing the identities of IPO allocants and with the division of allocation responsibilities among syndicate members. *Id.* ¶¶ 39, 56. They seek to infer conspiratorial conduct from underwriters' participation in registered stock exchanges, such as the New York Stock Exchange, and other self regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD). *Id.* ¶¶ 46-47. And they challenge underwriters' practice of favoring long-term investors over "flippers" in the allocation of IPO shares. *Pfeiffer* Compl. ¶¶ 64-65, 81. The SEC explained in an

amicus brief, and the district court held, that each of these activities is "expressly permitted under the current securities regulatory regime." App., *infra*, 92a-93a.

Plaintiffs also allege that defendant underwriters conspired to require IPO purchasers to pay "anticompetitive charges" in addition to the IPO price. Those "charges" purportedly included "tie-in" or "laddering" obligations—requiring purchasers of shares in an IPO also to commit to purchase the security in the aftermarket at escalating prices, to purchase the issuer's securities in subsequent offerings, or to purchase other less attractive securities—and agreements that IPO allocants would pay excessive commissions on trades in other securities. App., *infra*, 17a-18a, 73a-74a; Am. Compl. ¶¶ 1-7. Plaintiffs assert that this alleged conduct, along with underwriters' influencing their analysts "to issue positive reports," inflated the price of the IPO stocks in the aftermarket. App., *infra*, 18a; Am. Compl. ¶¶ 7, 60. Plaintiffs who received allocations of the offering at the issue price assert that they were injured by having to pay additional charges; plaintiffs who purchased stock in the aftermarket assert they were injured because they paid an inflated market price. App., *infra*, 18a-20a, 74a-75a; Am. Compl. ¶ 79; *Pfeiffer* Compl. ¶¶ 5, 125-126.

The conduct alleged in these cases is also the subject of 310 class actions brought under the securities laws. *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); see also *id.*, 227 F.R.D. 65 (S.D.N.Y. 2004) (certifying classes), Rule 23(f) appeal pending (2d Cir.) (No. 05-3349). Those suits—brought by many of the same plaintiffs' lawyers involved in these antitrust cases—allege an "industry-wide scheme" characterized by the same "tie-in" agreements, payment of additional compensation to underwriters, and optimistic analyst reports that are challenged by the antitrust plaintiffs. Plaintiffs in the securities cases allege that this conduct violated section 10(b) of the Securities Exchange Act and Rule 10b-5 by manipulating the market for

IPO stocks, and section 11 of the Securities Act by making untrue statements and omissions in registration statements. 241 F. Supp. 2d at 293-296.

B. The SEC Explained That These Antitrust Suits Conflict With The Exercise Of Its Regulatory Authority And So Are Barred By This Court's Implied Immunity Precedents.

A "detailed regulatory scheme," such as that created by the Securities Act and the Securities Exchange Act, "ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004), citing *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975). The defendant underwriters accordingly moved to dismiss the complaints.

Defendants relied on a trilogy of cases considering the application of the antitrust laws to the securities industry: *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963); *Gordon*; and *NASD*. In those cases the Court held that the delicate balance of the countervailing interests at play in this industry is best achieved through finely-tuned securities regulation rather than the blunt application of the antitrust laws. Accordingly, those decisions establish that immunity will be implied when either (i) Congress has given the SEC direct authority over the challenged conduct and the Commission has exercised that authority or (ii) the conduct at issue is subject to a pervasive regulatory scheme. In either case, immunity will be implied if application of the antitrust laws would conflict with, rather than merely supplement, the relevant regulatory regime—a finding that is particularly likely where the SEC's regulation has sought to strike a balance between competition and other statutory objectives. See *Gordon*, 422 U.S. at 690-691; *NASD*, 422 U.S. at 729. The ultimate purpose of the

doctrine is "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'" *Trinko*, 540 U.S. at 406, quoting *NASD*, 422 U.S. at 734.

Despite the unambiguous standards laid down in this Court's precedents, the SEC and the Antitrust Division of the Department of Justice (DOJ) were hopelessly conflicted over the proper disposition of the motions to dismiss. Each submitted amicus briefs in the courts below on opposite sides, the SEC arguing for and the DOJ against immunity. The SEC explained that "[t]he IPO allocation and commission practices challenged fall within the very heart of the Commission's regulatory authority over underwriting syndicates" and "are comprehensively regulated." Mem. Amicus Curiae of SEC to the district court, at 1 (Dec. 20, 2002), App., *infra*, 127a. Immunity is required under this Court's decisions, the SEC contended, because "'an antitrust suit would conflict with the operation of [this] regulatory scheme.'" Post-Argument Letter Br. of SEC to Second Circuit, at 4 (Mar. 21, 2005), App., *infra*, 193a, quoting *Gordon*, 422 U.S. at 688.

The SEC's brief described its plenary authority to regulate "the offering process under the Securities Act," including communications during road shows (App., *infra*, 132a; 15 U.S.C. § 77e; 17 C.F.R. §§ 230.134, .137-.139, .460-.461); its authority to "permit or prohibit manipulative acts in the purchase and sale of securities under the Exchange Act," including manipulation during an IPO and price stabilization following an offering, addressed in sections 9(a) and 10(b) of the Exchange Act and Regulation M (App., *infra*, 132a, 135a, 149a; 15 U.S.C. §§ 78i(a), 78j(b); 17 C.F.R. §§ 242.100-.105); and its oversight of the NASD, which "comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission." App., *infra*, 136a. The Commission explained that it is required, in exercising these comprehensive powers, to

consider effects on competition, but is not obliged to take actions that are "'the least anti-competitive manner of achieving a regulatory objective.'" *Id.* at 130a-131a, quoting S. REP. No. 94-75, at 13 (1975), 1975 U.S.C.C.A.N. 179, 191; see 15 U.S.C. §§ 77b(b), 78o-3(b)(9), 78w(a)(2).

Most of the joint conduct by syndicate members challenged in these suits as an antitrust conspiracy "is necessary to the offering process" and "permitted under the Commission's rules." App., *infra*, 127a. To the extent the alleged tie-in conduct might violate the securities laws, the SEC is "actively pursuing" a "comprehensive regulatory respons[e]." *Id.* at 127a-128a. The Commission and the NASD investigated IPO allocation practices following the market bubble and have filed and settled actions against several investment banks. *Id.* at 137a-138a. Each of those actions alleged that the investment bank engaged in one or more of the IPO allocation practices challenged here, involved alleged violations of Regulation M or NASD Conduct Rule 2110, and settled without an admission or denial of liability. *E.g.*, *SEC* v. *Credit Suisse First Boston* (Jan. 22, 2002), www.sec.gov/litigation/litreleases/lr17327.htm; see App., *infra*, 196a. In addition, the SEC has established a blue-ribbon panel to recommend rule changes. *Ibid.* To date the SEC has proposed amendments to Regulation M prohibiting underwriters from receiving consideration from IPO customers above the offering price of a security. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004). It also is reviewing proposed SRO rule changes addressing "quid pro quo allocations" of IPO stock. Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004). See App., *infra*, 137a-139a, 194a-197a.

In the exercise of its regulatory authority over public offerings the SEC has engaged in expert line-drawing with respect to the very conduct alleged in this case, of the type that implied immunity is designed to accommodate. Its *IPO Allocations Release* describes fact-intensive distinctions between "legitimate underwriting practices" that "facilitate capital

formation" and unlawful manipulation. App., *infra*, 220a. According to the SEC, the difference between a permissible conversation about aftermarket interest and a potentially impermissible communication linking allocations to aftermarket activity may turn on a few words, or no words at all, in discussions between IPO investors and underwriters. *Id.* at 225a-232a.[1]

Similarly, SEC rules do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services" for which "the customer has not paid excessive compensation." Release No. 34-50831, 69 Fed. Reg. at 75785. The difference between customers who traded heavily, generated commissions, and permissibly received allocations in light of their valuable business relationships, and any customers who sought to increase their allocations by paying "excessive" compensation depends on the facts and circumstances of each transaction.

The lines drawn by the SEC are not static. The Commission "continual[ly] adjust[s]" rules in light of "newly emerging or identified problems," "balancing and re-balancing relevant factors to protect investors and the public interest," including balancing "anti-competitive effects" against "countervailing benefits" in a context where the syndicate underwriting system "inherently" raises "substantial antitrust concern." App., *infra*, 190a-192a, 195a. What rules may be

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[1] "Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ('aftermarket interest') or immediate aftermarket buying would help them obtain allocations of hot IPOs" would violate SEC regulations. "However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct." *IPO Allocations Release*, App., *infra*, 228a.

adopted in the future with respect to conduct that "could be characterized as a tie-in or laddering" is "impossible to foresee" because it depends on "what future developments in the offering process" and the SEC's "understanding of the public interest and investor protection may require." *Id.* at 191a.

Disagreeing fundamentally with the DOJ's assertion that immunity was unnecessary here, the SEC explained below that the conduct alleged by plaintiffs "may or may not be permissible" under the securities laws, "depending upon the facts." App., *infra*, 156a. It warned that allowing an antitrust jury to review those fine-line distinctions threatens to "discourag[e] useful interactions among participants in the offering process that are permitted under the securities laws" and "over-deter conduct that would serve the interests of the markets and the capital formation process." *Id.* at 193a-194a. The SEC cautioned that IPO participants "should not be subjected to the fear that in interpreting and applying the comprehensive governing body of securities laws rules, they could find themselves not only liable for violating the securities laws, but also in an antitrust treble damages action." *Id.* at 193a. Without immunity, "antitrust concerns will become the predominant considerations in the underwriting process." *Id.* at 194a. And the "*in terrorem* effect" of treble damages will "distort market participant behavior in ways that are harmful to the overall securities markets." *Id.* at 197a.

C. The District Court Dismissed Plaintiffs' Complaints Under This Court's Implied Immunity Precedents.

After carefully analyzing this Court's precedents and the SEC's and DOJ's submissions, the district court held defendants were entitled to immunity because the SEC's "sweeping power" to regulate the specific conduct alleged by plaintiffs creates a "potential conflict with the antitrust laws." App., *infra*, 86a. Judge Pauley also "agree[d] with the SEC's contention that its regulatory authority over the conduct al-

leged" is "pervasive" and should not be undermined by potentially conflicting antitrust claims. *Ibid.*

The district court observed that "much of the conduct" at issue, such as the underwriting syndicate scheme, "is authorized under the current securities regulatory regime." App., *infra*, 86a. In addition, the SEC has broad authority under Exchange Act sections 9(a)(6) and 10(b) to regulate IPO allocation and commission practices. The SEC has actively exercised that authority and is investigating the very practices covered by plaintiffs' complaints. The NASD, over which the SEC has "pervasive regulatory oversight," is likewise considering new rules to deal specifically with that conduct. *Id.* at 87a-88a, 116a-117a. Given Congress's "unique mandate" to the SEC "to balance competition with other market concerns," such as capital formation, and the SEC's "broad power to regulate the conduct at issue," the court concluded that "potential conflicts exist" between "the securities and antitrust regulatory regimes" even as to alleged "activities that are, at the current time, prohibited under both." *Id.* at 94a, 96a. The court thus rejected the view expressed by the DOJ that there is no clear conflict between the securities regulatory regime and these antitrust claims. *Id.* at 119a-120a.

D. The Court Of Appeals Rejected The SEC's Position On Immunity And Reversed.

The court of appeals reversed the district court's decision, making this the *only* case in which the SEC has urged implied immunity and a court has rejected the Commission's position. App., *infra*, 64a-70a. The Second Circuit acknowledged that immunity applies where there are "'potential specific conflicts'" between the antitrust and securities laws or "'pervasive regulation'" under the securities laws. *Id.* at 49a. It labeled the "pervasive regulation" ground of immunity "vague," however, and suggested that it may apply only "where the activities of an SRO, extensively regulated by the

SEC, are challenged as anticompetitive," which is not the case here. *Id.* at 50a.

With respect to "potential specific conflict," the court of appeals held that there is implied immunity only if "Congress contemplated the specific conflict and intended for the antitrust laws to be repealed"—a novel test that comes close to imposing the same showing required for express antitrust immunity. App., *infra*, 57a. In determining whether its new standard was met, the court looked for (1) a legislative history or statutory structure demonstrating Congress's intent to repeal the antitrust laws with respect to the specific challenged conduct; (2) the possibility of conflicting mandates when the "regulatory structure empower[s] an agency to compel action prohibited by the antitrust laws"; (3) the likelihood that application of the antitrust laws would moot a provision of the securities laws; and (4) a "regulatory history permitting, at some point, the challenged anticompetitive conduct." *Id.* at 53a-55a.

The court of appeals acknowledged that "the SEC has unquestionable jurisdiction over the tie-in agreements underlying plaintiffs' complaints" and that the SEC in fact regulates "tie-ins" and "laddering." App., *infra*, 64a-67a. Nevertheless, examining the four factors noted above, it declined to confer implied immunity. It found "no legislative history indicating that Congress intended to immunize anti-competitive tie-in arrangements." It found that the Commission could not "force underwriters to offer tie-in agreements." The court believed that no provision of the securities laws "would be 'rendered nugatory' by application of the antitrust laws" to the alleged tie-in and compensation arrangements. And it found that the SEC has never authorized arrangements that would constitute tie-ins under current SEC guidelines. *Id.* at 64a-66a. The court suggested that on remand a fact-intensive "rule of reason" analysis may be appropriate. *Id.* at 70a.

REASONS FOR GRANTING THE PETITION

This Court should review the Second Circuit's decision "[b]ecause of the vital importance of the question" whether implied antitrust immunity applies where the conduct at issue is heavily regulated by an administrative agency charged with taking competition into account and that agency maintains immunity is "necessary to make [the securities laws] work." *Gordon*, 422 U.S. at 663, 683, 686. The court of appeals' ruling on this recurring question conflicts directly with this Court's decisions.

The SEC, the expert agency charged by Congress with regulating the IPO underwriting process, has advocated immunity from these antitrust actions in the most emphatic terms. The SEC explained that it regulates all of the conduct alleged by plaintiffs. As part of that regulation, it "performs the antitrust function" of taking competition concerns into account, but also, as Congress has mandated, balances other interests such as capital formation and market efficiency. See *Silver*, 373 U.S. at 358. The SEC warned that application of the antitrust laws here will cause serious injury to its regulatory functions, to the operation of public securities markets, and to the investing public. The Second Circuit's rejection of the Commission's view—in an area so central to the Nation's economy and the SEC's expertise—makes this a case of extraordinary public importance.

That the Department of Justice submitted briefs opposing immunity—creating a deep divide between the responsible government bodies—also signals the need for this Court to resolve the dispute. Both the DOJ and the SEC have recognized (in cases in which they similarly disagreed) that the circumstances in which the antitrust laws are impliedly repealed by the securities laws "presents important questions involving the application of the antitrust laws to the multi-billion-dollar" securities markets and deserve this Court's attention. Jurisdictional Statement of the United States,

United States v. *NASD*, No. 73-1701, at 10 (May 1974); see Mem. of the SEC as Amicus Curiae in Support of Certiorari, *Gordon* v. *NYSE*, No. 74-304, at 6 (Nov. 1974). In both cases, review was granted and the SEC's views prevailed. Indeed, with the exception of the ruling below, courts have recognized immunity in every case in which the SEC has urged that immunity is necessary to accomplish the goals of the securities laws. See also *Austin Mun. Sec.* v. *NASD*, 757 F.2d 676 (5th Cir. 1985); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65 (7th Cir. 1980).

The Second Circuit's ruling flies in the face of this Court's decisions in *NASD* and *Gordon*, which for 30 years have guided the immunity inquiry and which were recently reaffirmed in *Trinko*. The ruling below reduces the implied immunity doctrine to a dead letter—barely distinguishable from express immunity—by requiring an overt statement of legislative intent on the very conduct at issue, as well as a finding that the SEC has the power to compel, and has actually permitted, that conduct. This Court has imposed no such prerequisites for implied immunity.

By failing to make the implied immunity decision in light of the criteria laid down by this Court, the Second Circuit has undermined the SEC's regulatory mission and created great confusion regarding the recurring issue of when immunity applies. Indeed, this case is even more important as a practical matter than *NASD* and *Gordon* because the practices at issue—syndicated underwritings of IPO securities—are at the very heart of SEC regulation under the 1933 and 1934 Acts. The court of appeals' ruling threatens the public offering process, which was responsible for raising approximately $48 billion in 2004 alone, by forcing underwriters to focus on avoiding treble damages antitrust liability when forming and operating syndicates rather than on complying with the securities laws.

In sum, this Court should grant certiorari to prevent the securities regulatory scheme from being undermined by antitrust litigation in which the opinion of a lay jury applying narrow competition rules overrides the careful weighing of competitive concerns with broader goals of investor protection that Congress expressly committed to the SEC's expertise. See *Trinko*, 540 U.S. 398 (granting certiorari and reversing unanimous decision of Second Circuit that overturned dismissal on immunity grounds and permitted private antitrust litigation to undermine scheme of administrative regulation).

I. THE SECOND CIRCUIT IMPROPERLY REJECTED THE EXPERT VIEW OF THE SEC THAT IMMUNITY IS ESSENTIAL HERE TO MAKE THE SECURITIES LAWS WORK.

This Court emphasized in *Trinko* that where "a regulatory structure designed to deter and remedy anticompetitive harm" is in existence, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." 540 U.S. at 412. There is no question that Congress has charged the SEC with weighing competition concerns in exercising its authority over the IPO allocation process. Under the Exchange Act, Congress expressly requires the SEC to balance competition against other interests "necessary or appropriate in furtherance of the purposes of" the Act. 15 U.S.C. § 78w(a)(2). Moreover, Congress reaffirmed this duty in 1996, when it amended both the Securities Act and the Exchange Act to require the SEC in carrying out its administrative functions to weigh competition among other factors. See 15 U.S.C. § 77b(b) (Securities Act) ("the [SEC] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); 15 U.S.C. § 78c(f) (Exchange Act) (same); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110

Stat. 3416, 3424-3425 (Oct. 11, 1996) (adding 15 U.S.C. §§ 77b(b) and 78c(f)).

The SEC informed the court of appeals that denying immunity in these cases would upset the regulatory scheme governing syndicated underwriting. Such a decision would "effectively supplant" the securities laws with antitrust litigation that, because it carries the risk of treble damages imposed by a lay jury, would "force participants in the securities markets to focus not on complying with the securities laws, but predominantly on avoiding antitrust liability." App., *infra*, 196a-197a. And it would make joint underwriter conduct during the IPO process subject to a statutory regime that "does not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance." *Id.* at 196a.

Congress well understood the need for the SEC to have broad and flexible authority to regulate complex and rapidly evolving securities markets. "[S]o delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program" but requires "considerable latitude" for "administrative discretion" in order "to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." S. REP. NO. 73-792, at 5 (1934); see also H.R. REP. NO. 73-1383, at 6-7 (1934) ("broad discretionary powers in the [SEC] have been found practically essential"). In order to preserve this flexibility, Congress squarely rejected the Justice Department's argument in connection with the 1975 amendments to the Exchange Act that the SEC "should be required * * * to adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets in securities." Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 19, 1980); see *ibid.* ("Congress * * * declined to adopt that rigid stan-

dard and instead chose the balancing tests currently found in [15 U.S.C. § 78o-3(b)(9)] and elsewhere in the Act").

The need for broad discretionary powers is nowhere greater than in the area of "IPO allocation and commission practices," which "fall within the very heart of the Commission's regulatory authority." App., *infra*, 127a. As the Commission observed, its regulation of the syndicate offering process "has involved a continual adjustment of previous rules"—a dynamic regulatory response to "new issues as they emerge" that is incompatible with the application of the antitrust laws to the same conduct. *Id.* at 195a.

There is no doubt that the SEC, as it informed the courts below, has authority to regulate the joint conduct alleged in plaintiffs' antitrust complaints and has in fact subjected that conduct to "comprehensive and active Commission oversight and regulation." App., *infra*, 197a; see also *id.* at 127a. The Commission has pervasive authority over the underwriting process and compensation practices, actively oversees SRO rules concerning both, and has regulated and approved the joint syndicate underwriting system that plaintiffs challenge. It also has ample authority to protect investors and markets from manipulative conduct of any type. See *supra* pp. 6-9.

Tie-in conduct has not escaped Commission regulation. The SEC has power under section 9(a)(6) of the Exchange Act to prohibit (or allow) transactions intended to fix or stabilize securities prices, and under section 9(a)(2) to define prohibited trading intended to raise or depress prices. See 15 U.S.C. § 78w(a)(1) (granting the SEC power to make rules to implement the Act, including its antimanipulation provisions). For decades the Commission has vigilantly supervised public offering practices in "hot" markets in which demand for new issues is high, including "tie-in arrangements, and manipulation of the aftermarket." REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 28 (Aug. 1984); see *id.* at 37-40; REPORT OF THE SPECIAL STUDY OF SECURITIES

MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Part 1, at 487-488, 514-559 (Apr. 1963). During the purported class period here, it warned that Regulation M prohibits "activities that could artificially influence the market," including "'tie-in' agreements." SEC Div. of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-In" Agreements for Aftermarket Purchases* ¶¶ 1-2 (Aug. 25, 2000); see App., *infra*, 135a. It has since proposed amendments to Regulation M that would prohibit underwriters from receiving consideration from IPO customers above the offering price and has published for comment proposed SRO rule changes to address tie-ins. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004); Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004).

The SEC has used its powers to investigate conduct of the sort challenged by plaintiffs, filing and settling actions against individual underwriters for alleged violations of Regulation M. *Supra* p. 7. The Exchange Act's antimanipulation provisions are also the basis for private securities fraud litigation directed at conduct alleged in these antitrust suits, in which legal rules prescribed by Congress in the securities laws and by the SEC will control. *Supra* pp. 4-5.

The SEC recognizes that sensitive, fact-specific evaluations must inform any assessment whether particular underwriting conduct violates the securities laws. Its *IPO Allocations Release* draws fine distinctions between permissible collaborative bookbuilding activity that includes inquiries about a would-be IPO allocant's aftermarket interest and the price at which it would purchase shares in the aftermarket, and unlawfully informing the customer that such purchases would improve its prospects of obtaining an allocation. See *supra* p. 8 & n.1. Similarly, the Commission distinguishes between permissibly allocating IPO shares to a good customer that pays substantial commissions and doing so as a quid pro quo for a customer paying "excessive com-

pensation" for services (itself a difficult determination). Release No. 34-50831, 69 Fed. Reg. at 75785. Accordingly, the SEC recognizes that the conduct alleged by plaintiffs "may or may not be permissible, depending upon the facts." App., *infra*, 156a. That line-drawing cannot be done by a lay jury applying generalized rule-of-reason principles under the antitrust laws, but depends on careful application of securities law principles, whether by the SEC, the SROs it regulates, or a court in private securities litigation.

In light of this regulatory history and ongoing regulatory activity, this Court's decisions in *Gordon* and *NASD* require immunity here. See App., *infra*, 140a-147a. Under this Court's precedents, implied immunity protects "'the operation of the regulatory scheme'" and is triggered when immunity is necessary "'to permit the [securities laws] to function as envisaged by the Congress.'" *Id.* at 143a, quoting *Gordon*, 422 U.S. at 688. Given the SEC's comprehensive authority over syndicate underwriting and manipulative conduct, its exercise of that authority over the conduct alleged here through both rulemaking and enforcement, and its statutory mandate to weigh competition concerns, the requirements for immunity set forth in *Gordon* and *NASD* are satisfied, as the SEC explained below. See App., *infra*, 193a-194a.

Because the SEC is well-placed to determine the impact of potential antitrust liability on the effective operation of its statutory powers and of the securities markets, federal courts in every previous case have credited those expert views. See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 240c, at 14 (2d ed. 2000). The Second Circuit's rejection of immunity where the SEC says it is essential to "the effectiveness of the regulatory regime established by Congress" and to prevent distortion of the capital formation process urgently calls for this Court's review. App., *infra*, 192a, 193a-194a.

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND CREATES INTOLERABLE CONFUSION OVER THE SCOPE OF ANTITRUST IMMUNITY.

This Court has recognized implied immunity in circumstances closely analogous to those involved here. As the Court held in *Gordon*, "where the agency both has the power to control [defendant's] conduct and actually exercises that power," the antitrust laws are "ousted" because of the potential for conflict with the securities regulatory regime. 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36 & n.6. In *NASD*, where the record was clear that Congress had vested in the SEC authority to regulate and supervise the challenged conduct and the SEC confirmed that its authority "w[ould] be compromised seriously" if the antitrust case were permitted to proceed, this Court concluded that implied repeal was necessary to make the regulatory scheme work. 422 U.S. at 729-730. Rather than follow the legal standards set forth in *Gordon* and *NASD*, the court of appeals invented a novel test that restricts the availability of implied immunity and diverges from the immunity standard used by any other circuit.

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Implied Immunity Rulings.

1. In *Silver*, this Court held that antitrust immunity for an NYSE order requiring members to eliminate telephone connections with nonmember firms was not "necessary to make the Securities Exchange Act work" because (at that time) the SEC lacked "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 347, 357; see *id.* at 358 ("the Commission's lack of jurisdiction * * * means that the question of antitrust exemption does not involve any problem of conflict"). But, this Court observed, "a different case" would arise if the SEC had jurisdiction to review "exchange self-regulation" and safeguards were "built into the

regulatory scheme which perfor[m] the antitrust function of insuring that an exchange" would not apply its rules in an unjustifiably anticompetitive manner. *Id.* at 358-360.

2. That "different case" arose in *Gordon*, which like these cases involved antitrust challenges to alleged brokerage commission practices. Accepting the views of the SEC and rejecting those of the Department of Justice, this Court held that the defendants were immune from antitrust liability for allegedly conspiring to maintain fixed commission rates.

Gordon found "plain repugnancy" between the antitrust laws and securities regulatory regime. 422 U.S. at 682. Congress had given the SEC "direct regulatory power over rules and practices with respect to 'the fixing of reasonable rates of commission.'" *Id.* at 685. The SEC had exercised that power by "tak[ing] an active role in review of proposed rate changes," ultimately prohibiting fixed rates "not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure." *Id.* at 676, 685. "[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress." *Id.* at 690; see 1A AREEDA & HOVENKAMP, *supra*, ¶ 243d, at 43 (*Gordon* "focused on the importance of an antitrust immunity to the general regulatory scheme"). Without immunity, antitrust courts and the SEC would likely apply different standards to commission-setting practices because "the SEC must consider, in addition [to competition], the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689. This Court thus found immunity necessary in order to leave to the SEC the supervision of commission practices, as Congress intended. See *id.* at 691 (application of the antitrust laws to commission practices would "render nugatory the legislative provision for regulatory agency supervision").

3. In *NASD*, decided the same day, this Court held that antitrust immunity must be implied not only where the SEC actively exercises its regulatory authority over challenged conduct, but also where the SEC's authority is so pervasive that conflict with the antitrust laws is likely. At issue was whether the NASD and its members were entitled to antitrust immunity for allegedly conspiring to restrict the sale and fix prices of mutual-fund shares in the secondary market. 422 U.S. at 700. Because the Department of Justice (in an effort to avoid a finding of immunity) disclaimed a direct attack on NASD rules and instead challenged "various unofficial NASD interpretations" of those rules, this Court considered "whether the SEC's exercise of regulatory authority" under the securities laws was "sufficiently pervasive to confer an implied immunity." *Id.* at 730, 732. It held that the SEC's authority over the NASD and its members was "pervasive" and that the SEC "weigh[ed] competitive concerns" along with other interests in exercising that authority. *Id.* at 732-733. Because "the broad regulatory authority conferred upon the SEC * * * enable[d] it to monitor" the allegedly anticompetitive activities, "and the history of [SEC] regulations suggest[ed] no laxity in the exercise of this authority," defendants were entitled to antitrust immunity. *Id.* at 734. This Court thus refused to compromise the SEC's authority "to deal * * * flexibly with * * * detrimental trading practices" by subjecting them to the antitrust laws. *Id.* at 724-725.

Contrary to the view of the court of appeals *NASD* did not immunize only "association activities approved by the SEC" or turn on the "special status" of the NASD as an SRO. App. *infra*, 68a. An alleged conspiracy between broker-dealers who (like the underwriter defendants here) were members of the NASD was also held immune because of the SEC's pervasive regulatory authority. 422 U.S. at 733. Nor was immunity barred even though the SEC's "power to prescribe rules and regulations" governing certain conduct at issue was "unexercised." *Id.* at 721-722. Because the "main-

tenance of an antitrust action for activities so directly related to the SEC's responsibilities" could potentially subject defendants "to duplicative and inconsistent standards," the antitrust laws were "displaced by the pervasive regulatory scheme." *Id.* at 735.

4. This Court consistently has adhered to the principles set forth in *Gordon* and *NASD*, most recently in *Trinko*—a decision that the Second Circuit brushed aside. See App., *infra*, 41a n.36. *Trinko* involved an alleged unilateral refusal to deal by a regulated entity where dealing requirements were supervised by state and federal agencies. An explicit antitrust savings clause in the Telecommunications Act of 1996 precluded immunity. This Court nevertheless held an antitrust suit improper in light of the "real possibility" that an antitrust jury's judgment would "conflic[t] with the agency's regulatory scheme," which took competitive concerns into account. 540 U.S. at 406. The difficulty of analyzing the antitrust claim in *Trinko*—which, like plaintiffs' claims here raised the likelihood of "[m]istaken inferences," "false condemnations," and "interminable litigation"—also led this Court to conclude that while the costs of antitrust intervention would be great, "the additional benefit to competition provided by antitrust enforcement will tend to be small." *Id.* at 412, 414.

5. Instead of applying this Court's standards, the court below established a novel test for implied immunity that looks to whether the regulatory agency could compel the challenged action, whether the agency had permitted that action at some point, whether application of the antitrust laws would moot specific provisions of the securities laws, and whether Congress expressed an intent to immunize the specific conduct at issue. App., *infra*, 53a-55a.

The court of appeals' holding that immunity must be premised on the SEC's ability to "compel the anticompetitive conduct the antitrust laws would prohibit" (App., *infra*, 65a) finds no support in *NASD* or *Gordon*, which focus instead on

whether Congress "provided for SEC authority" to exercise "direct regulatory power," not on power to compel particular behavior. *Gordon*, 422 U.S. at 685, 690. The power to compel may be sufficient to imply immunity, but it is not a precondition for immunity. See 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36-37.

The court of appeals also focused improperly on whether the SEC had permitted "tie-ins." See *id.* ¶ 243d, at 44 (agency authorization is not "a prerequisite to immunity"). Congress conferred on the SEC "direct regulatory power" to supervise syndicate underwriting and the sorts of conversations during that process that plaintiffs characterize as tie-ins. *Gordon*, 422 U.S. at 685. Because the SEC exercised that power, *Gordon* and *NASD* require immunity so as not to disrupt the regulatory scheme. Thus in *NASD*, this Court found implied immunity where the SEC had "pervasive regulatory power" over alleged conduct, even though that conduct was neither required nor affirmatively authorized by the Investment Company Act or SEC or NASD rules. See 422 U.S. at 730-733. Even a history of inattention is no barrier to immunity so long as the SEC possesses regulatory power. *Gordon*, 422 U.S. at 690. The court of appeals' inquiry overlooks the SEC's power to draw the line between proper and improper syndicate bookbuilding practices, which can be indiscriminately characterized as conspiracies to engage in "tie ins" by antitrust class action litigants demanding treble damages.

Under *Gordon* and *NASD*, the import of statutory purpose does not hinge, as the Second Circuit held, on whether Congress specifically "intended to immunize anti-competitive tie-in arrangements." App., *infra*, 64a. Nor does immunity require that there be a "provision, sentence, phrase, or word" of the statutory or regulatory scheme that will be mooted by application of the antitrust laws. App., *infra*, 65a. Rather, implied immunity turns on whether Congress authorized the SEC to review, evaluate, and regulate the practices at issue. Accordingly, *Gordon* concluded that the "Exchange Act was

intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC." 422 U.S. at 691. Similarly, *NASD* concluded that Congress intended to authorize the SEC to deal "flexibly with * * * detrimental trading practices." 422 U.S. at 724-725.

The Second Circuit's novel ruling that implied immunity requires a narrowly focused indication that Congress meant to "immuniz[e] the specific anticompetitive activity" (App., *infra*, 64a) cannot be squared with *Gordon* or *NASD*. It would undermine the securities laws by immunizing, in a dynamic and rapidly evolving field, only that conduct specifically identified by Congress 70 years ago. Under that approach the distinction between express and implied immunities would virtually disappear. See 1A AREEDA & HOVENKAMP, *supra*, ¶¶ 242a, 242b, at 30-32 (express immunity applies when immunity "is express in the federal statute," is otherwise clear from the statute, or a "statute or rule * * * compels certain conduct"). Yet the very purpose of implied immunity is to enable a court to protect the workings of a regulatory scheme when Congress did not explicitly address immunity. It is unreasonable to require Congress to express a view as to unforeseeable future circumstances in order for immunity to be implied. Congress did not insert an antitrust savings clause in the securities laws, as it has in other statutes. This Court has made clear that immunity should be implied when necessary as a practical matter "to make the [securities laws] work." *Gordon*, 422 U.S. at 683.

The court of appeals' deviation from this Court's well-established implied immunity precedents—in a circuit in which the securities industry is based and most immunity claims have been litigated—threatens the entire scheme of federal securities regulation, as the SEC has explained. It deserves this Court's immediate attention.

B. The Second Circuit's Decision Creates Serious Confusion Concerning The Criteria For Implied Immunity.

The Second Circuit's test for implying immunity at the intersection of the securities and antitrust laws deviates from the law in other circuits and invites a flood of new antitrust class action litigation. Other courts of appeals facing this recurring issue have faithfully applied *Gordon* and *NASD*, consistently finding immunity to be required.

1. No court has ever before held that the SEC must be able to compel an action under the securities laws before that action may be impliedly immune. Courts have routinely implied immunity without first finding such a test satisfied. They have considered whether the SEC "exercises extensive oversight authority" over an activity. *Austin Mun. Sec., Inc.* v. *NASD*, 757 F.2d 676, 695 (5th Cir. 1985). They have evaluated whether the activity has been permitted by the SEC. *Harding* v. *American Stock Exch.*, 527 F.2d 1366, 1369-1370 (5th Cir. 1976); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65, 70 (7th Cir. 1980). And they have analyzed whether the "SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it." *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002). Courts have never before required that the SEC possess the power to *compel* a particular activity before they imply antitrust immunity in the face of the SEC's authority to allow, prohibit, or otherwise regulate that activity.

2. Nor have other courts of appeals required a history of "SEC authorization—whether past or present—of the specific anticompetitive behavior." App., *infra*, 66a. They have instead granted immunity, as *Gordon* and *NASD* contemplated, upon finding that the SEC's authority to regulate creates risks of conflict with the antitrust regime. Thus, in *Austin Municipal*, the Fifth Circuit analyzed the SEC's authority to regulate the NASD disciplinary process, not its

track record in doing so. 757 F.2d at 695. The Seventh Circuit in *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287, 1300 (7th Cir. 1975), was similarly concerned with whether "[t]he sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts," not whether the SEC had actually regulated it.

3. The Second Circuit's requirement that a defendant identify a particular "provision, sentence, phrase, or word" of the securities laws that will be "mooted" or "significantly curtailed by applying the antitrust laws" (App., *infra*, 65a-66a) contrasts with the position of courts that consider instead whether the antitrust laws will interfere with a "legislative provision for regulatory agency supervision." *Gordon*, 422 U.S. at 691. Thus in *Thill*, the Seventh Circuit regarded it as critical that the SEC had broad authority over the commission rate system. 633 F.2d at 69-70. And in *Austin Municipal*, 757 F.2d at 694-695, the Fifth Circuit implied immunity because the SEC exercised "supervision and regulatory authority" over the NASD disciplinary process and application of antitrust laws could "unduly interfere with the SEC's jurisdiction."

None of these courts created a restrictive, multi-factor standard for implied antitrust immunity even remotely like the one fashioned by the Second Circuit here. In a system in which antitrust liability is determined by juries, damages are trebled, and plaintiffs can bring virtually any antitrust class action against securities defendants in the Second Circuit, these inconsistencies in the test applied and result reached are intolerable. The risk to underwriters and other market participants is such that they must conform their behavior not to "the Commission's expert administration" but to the most restrictive interpretation of the antitrust laws and immunity standards that could apply to that conduct. App., *infra*, 196a. The Second Circuit's ruling will for all practical purposes override the conflicting law of other circuits that comports

with *NASD* and *Gordon*, making the need for this Court's review more compelling.

III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT SUBSTANTIAL ADVERSE CONSEQUENCES FOR U.S. SECURITIES MARKETS.

The risk of antitrust liability for conduct subject to SEC regulation "poses a substantial danger that [industry participants] would be subjected to duplicative and inconsistent standards." *NASD*, 422 U.S. at 735. If these antitrust suits are permitted to go forward, collaborative conduct during a syndicated public offering that is authorized, or not proscribed, by the SEC could nonetheless be deemed unreasonable by an antitrust jury and punished with treble damages payable to a sprawling class of investors.

Underwriters would lack reliable guidance in such an environment. With every syndication involving concerted conduct and every discussion with buyers open to depiction as collusion, underwriters would be fearful that building a book and assessing market interest—activities expressly authorized by the SEC (see *supra* pp. 3-4, 6)—would expose them to treble-damages liability in massive class actions. The same problem of conflicting standards arises even for activities that are currently barred by the SEC. The Commission explained that careful line drawing is essential to separate permissible from impermissible actions and that it may, in the future, deem currently proscribed activities to be permissible elements of the IPO process. App., *infra*, 191a; see *supra* pp. 7-9. As the SEC told the court of appeals, without a holding of immunity in this case, "antitrust concerns will become the predominant considerations in the underwriting process." App., *infra*, 194a.[2]

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[2] The court of appeals believed that the potential for application on remand of a "rule of reason" analysis "lowers the stakes" of the implied immunity decision. App., *infra*, 60a. But rule of reason

This shift in securities regulation would profoundly disrupt capital formation in the United States, which is principally achieved through syndicate underwritings of the kind challenged here. As the SEC explained, "the fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process." App., *infra*, 194a. The capital-raising process would become captive to the competition-first principles of the Sherman Act, applied by lay juries, undermining the "uniformity and certainty" that Congress has deemed essential "if our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong." 143 Cong. Rec. 21357 (1997) (Statement of Sen. Dodd).

As we have described in Part I, *supra*, permitting respondents' allegations to be adjudicated under the antitrust laws would undercut the SEC's practical authority to regulate in this area, contrary to the will of Congress. As one leading commentator has observed, "parallel track antitrust proceedings are highly likely to frustrate the agency's own role in applying its expertise to business conduct within its jurisdiction." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632-633 (2003).

Permitting antitrust law to displace securities regulation in this fashion also would heavily burden the federal courts. The plaintiffs' bar, even more eagerly than with securities

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analysis requires a complex and largely unpredictable evaluation of the procompetitive benefits and asserted justifications for the challenged conduct. Even if a rule of reason analysis were undertaken by a jury and sufficiently took into account administrative concerns (which given the line drawing necessary in this area is improbable), it would leave participants in syndicate underwritings exposed to grave uncertainties in class action antitrust litigation. Immunity is particularly appropriate when antitrust claims are complex and difficult to evaluate, which is certainly true of a rule of reason analysis in this area. See *Trinko*, 540 U.S. at 414.

complaints, can be expected to file antitrust claims at every opportunity, lured by treble damages and awards of attorneys' fees (neither of which are available under the securities laws). See KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 90-94 (1976) (treble damages remedy encourages filing of strike suits). These cases would consume enormous judicial resources because antitrust suits, widely "known as 'serpentine labyrinths' in which discovery is a 'bottomless pit,'" tend to be far more complex and costly than other civil actions. 6 MOORE'S FEDERAL PRACTICE § 26.46[1], at 26-146.24 (3d ed. 2005). If the securities laws themselves do not create a scheme of "broad insurance against market losses" (*Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005)), Congress surely did not envisage treble damages for participants in stock market bubbles who wish to bypass federal securities remedies.

Congress has addressed the risk of strike suit class actions in the securities context by barring punitive damages, heightening pleading requirements, and regulating class litigation. *E.g.*, 15 U.S.C. § 78bb (barring punitive damages in securities fraud actions); Private Securities Litigation Reform Act, *id.*, § 78u-4(b)(1), (2) (requiring particularized pleading in securities fraud complaints); *id.*, § 78u-4(a) (establishing special procedural requirements for securities class actions). This Court too, has imposed pragmatic limitations on private securities fraud suits because they present "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-740 (1975). *E.g.*, *Dura*, 125 S. Ct. at 1631-1634 (requiring proof of loss causation); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (requiring proof of scienter, not mere negligence); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976) (rejecting lax definition of materiality); *Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977) (limiting definition of actionable manipulation); *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 189 (1994) (barring aid-

ing and abetting claims). Litigants should not be allowed to evade these limitations, and circumvent the will of Congress, by bringing a claim directed at the underwriting process under the antitrust laws rather than the securities laws.

This Court consistently has sought to protect the integrity of the regulatory process and avoid the conflict and confusion that result from parallel antitrust and regulatory challenges to the same conduct, determining if immunity is appropriate by gauging the practical consequences of antitrust adjudication on effective administrative supervision. An important factor in that analysis is that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve industry-specific disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952).

Careful distinctions drawn by the SEC between proper and improper IPO conduct will disintegrate if lay juries may instead apply a "reasonableness" standard under general antitrust criteria to respondents' claims. "[A]gency oversight ensures consistency of outcomes, something that antitrust jury trials would never produce." Hovenkamp, *supra*, 28 J. CORP. L. at 630. The blunt sanction of treble damages should not be superimposed upon regulatory disputes that are better addressed under the more carefully calibrated regulatory scheme established by Congress. *Trinko*, 540 U.S. at 406.

In sum, the court of appeals' rejection of implied immunity, unless reversed, will impose conflicting standards on underwriters, chill capital formation, undermine the delegated authority of the SEC, burden the federal courts, and produce unjust outcomes through blackmail settlements. Review by this Court is required to prevent these serious harms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Glen Billing, individually and on behalf of all those similarly situated, et al.,

Plaintiffs-Appellants,

Bajrang Agarwal, et al.,

Plaintiffs,

-v.-

Credit Suisse First Boston Ltd., Goldman, Sachs & Co., Lehman Brothers Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley Dean Witter, BancBoston Robertson, Stephens, Inc., Citigroup Global Markets, Inc., J.P. Morgan & Co., Merrill Lynch & Co., Inc., Fidelity Distributors Corporation, Fidelity Brokerage Services, Inc., Fidelity Investments Institutional Services Co., Janus Capital Corporation, Comerica, Inc., Van Wagoner Capital, Van Wagoner Funds, Inc., and J.P. Morgan Securities, Inc.,

Defendants-Appellees.

Docket Nos. 03-9284L & 03-9288CON

December 13, 2004, Argued
September 28, 2005, Decided

As Amended, October 26, 2005.

Before: OAKES, KATZMANN, and WESLEY, Circuit Judges.

WESLEY, *Circuit Judge*:

Plaintiffs allege an epic Wall Street conspiracy. They charge that the nation's leading underwriting firms entered into illegal contracts with purchasers of securities distributed in initial public offerings ("IPOs"). Through these contracts

and by other illegal means, the underwriting firms allegedly executed a series of manipulations that grossly inflated the price of the securities after the IPOs in the so-called aftermarket. Plaintiffs contend that the firms capitalized on this artificial inflation, profiting at the expense of the investing public.

Plaintiffs tell a compelling story and are not the first to tell it. Similar allegations have appeared in a separate class action, *see In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003), in a report of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), *see* NYSE/NASD IPO ADVISORY COMMITTEE, NYSE/NASD, REPORT AND RECOMMENDATIONS 1-2 (May 2003) ("IPO ADVISORY COMMITTEE REPORT"), *available at* http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_010373.pdf, and in complaints filed by the Securities and Exchange Commission (the "SEC" or "Commission").[1] What most immediately distinguishes the present charges from prior ones is that the earlier allegations were made in the context of the laws governing securities—laws and regulations arising primarily from the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat.

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[1] *See, e.g.*, *SEC v. Goldman Sachs & Co.*, SEC Litig. Release No. 19,051 (Jan. 25, 2005); *SEC v. Morgan Stanley & Co.*, Litig. Release No. 19,050 (Jan. 25, 2005); *SEC v. J.P. Morgan Sec., Inc.*, SEC Litig. Release No. 18,385 (Oct. 1, 2003); *SEC v. Robertson Stephens, Inc.*, SEC Litig. Release No. 17,923 (Jan. 9, 2003); *SEC v. Credit Suisse First Boston Corp.*, SEC Litig. Release No. 17,327 (Jan. 22, 2002). *See generally* Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations; Final Rule, Securities Act Release No. 8565, Exchange Act Release No. 51,500 (Apr. 7, 2005), 70 Fed. Reg. 19,672, 19,672-73 (Apr. 13, 2005) (highlighting recent abuses).

74 ("the Securities Act" or "the 1933 Act"), and the Securities Exchange Act of 1934, Pub. L. No. 73-290, 48 Stat. 881 ("the Securities Exchange Act," "the Exchange Act," or "the 1934 Act"). By contrast, the present actions arise under the antitrust laws—specifically, section 1 of the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1), section 2(c) of the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526, 1527 (1936) (codified as amended at 15 U.S.C. § 13(c)), and various state antitrust provisions.[2]

The question on appeal is whether these antitrust claims can stand. Defendants argue that, assuming plaintiffs' allegations are true, only securities laws can provide a

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[2] The *In re Initial Public Offering Antitrust Litigation* plaintiffs allege violations of section 44-1401 *et seq.* of the Arizona Revised Statutes, section 17200 *et seq.* of the California Business and Professional Code, section 28-4503 *et seq.* of the District of Columbia Annotated Statutes, section 501.201 *et seq.* of the Florida Statutes, section 50-101 *et seq.* of the Kansas Statutes Annotated, section 51:137 *et seq.* of the Louisiana Revised Statutes, section 1101 *et seq.* of title 10 of the Maine Revised Statutes Annotated, chapter 93A of the Massachusetts Annotated Laws, section 445.773 *et seq.* of the Michigan Compilation of Laws Annotated, section 325D. 52 *et seq.* of the Minnesota Statutes, section 75-21-1 *et seq.* of the Mississippi Code Annotated, section 598A *et seq.* of the Nevada Revised Statutes Annotated, section 56:9-1 *et seq.* of the New Jersey Antitrust Act, section 57-1-1 *et seq.* of the New Mexico Statutes Annotated, section 75-1 *et seq.* of the North Carolina General Statutes, section 51-08.1-01 *et seq.* of the North Dakota Century Code, section 37-1 *et seq.* of the South Dakota Codified Laws Annotated, section 47-25-101 *et seq.* of the Tennessee Code Annotated, section 2453 *et seq.* of title 9 of the Vermont Statutes Annotated, section 47-18-1 *et seq.* of the West Virginia Code, and section 133.01 *et seq.* of the Wisconsin Statutes.

remedy. The district court agreed. *See In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499, 523-25 (S.D.N.Y. 2003) ("*IPO Antitrust Litig.*"). It held that, regarding the alleged conduct, the securities laws impliedly repealed federal antitrust laws and preempted state antitrust laws. *See id.* It therefore dismissed the complaints. *Id.* at 525.

The district court's decision goes too far. The heart of the alleged anticompetitive behavior finds no shelter in the securities laws. Accordingly, we vacate and remand for further proceedings.

I

Essential to this appeal is a basic understanding of the securities underwriting process and certain manipulations of the process, most particularly the practice of tying excess consideration to an IPO securities allocation.

A

An underwriting firm provides underwriting services to issuers of securities. The most common delivery of those services is by firm-commitment agreements. 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 2.1[2][B], at 156 (5th ed. 2005). The appeal of this type of agreement is certainty for the issuer: "The underwriting investment banker agrees that on a fixed date the corporation will receive a fixed sum for a fixed amount of its securities." Statement of the Commission on the Problem of Regulating the "Pegging, Fixing and Stabilizing" of Security Prices Under Sections 9(a)(2), 9(a)(6), and 15(c)(1) of the Securities Exchange Act, Exchange Act Release No. 2446 (March 18, 1940), 11 Fed. Reg. 10,971, 10,972 (Sept. 27, 1946) ("1940 Statement"). The underwriting agreement thus removes "factors of uncertainty" for the issuer, *see id.*, and transfers to the underwriter the risk of any inability to sell an issue, *see* GOING PUBLIC AND LISTING ON THE U.S. SECURITIES MARKETS, NASD 167.

Syndicates emerged in the first half of the twentieth century as an essential means by which underwriters could manage the risks inherent in underwriting. *See generally United States v. Morgan*, 118 F. Supp. 621, 635-55 (S.D.N.Y. 1953). At that time, "no single underwriter could have borne alone the underwriting risk involved in the purchase and sale of a large security issue," and "no single underwriter could have effected a successful public distribution of the issue."[3] *Id.* at 640. The syndicate was a group typically "consisting of from a few to well over one hundred underwritten houses, [that bought] the entire new issue of securities from the issuing corporation at a predetermined fixed price"—the "purchase" price—"and immediately reoffered it to the public at a slightly higher price which is also a predetermined fixed price (the 'offering' or 'issue' price)." 1940 Statement, 11 Fed. Reg. at 10,972. "The issue was typically resold to the public both by the underwriters and by a so-called 'selling group' . . . who acted as retailers for the underwriting syndicate." *Id.* The syndicate system remains a prominent feature of the modern

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[3] Thus in 1906, when Goldman, Sachs & Co. desired to enter the underwriting business and was unable to raise enough capital to do so, Henry Goldman convinced Philip Lehman to share the risk, and together Goldman, Sachs & Co. and Lehman Brothers obtained sufficient capital to finance United Cigar Manufacturers (later named the General Cigar Co.). *See Morgan*, 118 F. Supp. at 637. This partnership, which involved jointly purchasing security issues directly from issuers and equally dividing what profits they realized from the sale, allowed the two firms to finance other enterprises like Sears, Roebuck & Co. and B.F. Goodrich Co. *See id.* at 637-38.

underwriting industry. *See IPO Antitrust Litig.*, 287 F. Supp. at 507.[4]

A lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO. *See* Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations; Final Rule, Securities Act Release No. 8565, Exchange Act Release No. 51,500 (Apr. 7, 2005), 70 Fed. Reg. 19,672, 19,674 & n.30 (Apr. 13, 2005) ("2005 Guidance Statement"). This is a difficult task, *see* 2 HAZEN, *supra* § 6.3[1], at 23-24, in which the lead underwriter is aided in part by "book-building":

> When used, the IPO book-building process begins with the filing of a registration statement with an initial estimated price range. Underwriters and the issuer then conduct "road shows" to market the offering to potential

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[4] Typically, the principal underwriters will sign the firm-commitment underwriting agreement. These managers or principal underwriters in turn contact other broker-dealers to become members of the underwriting group who are to act as wholesalers of the securities to be offered. In many instances the securities distribution network will include the use of a selling group of other investment bankers or brokerage houses. Members of the selling group generally do not share the underwriters' risk and are thus retailers who are compensated with agents' or brokers' commission rather than by sharing in the underwriting fee.

1 HAZEN, *supra* § 2.1[2][B], at 156; *cf.* Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994), 59 Fed. Reg. 21,681, 21,686 (Apr. 26, 1994) ("A firm commitment underwriting typically involves a group of underwriters, represented by one or more managing underwriters, an underwriting group, and a number of 'selling group' members.").

> investors, generally institutions. The road shows provide investors, the issuer, and underwriters the opportunity to gather important information from each other. Investors seek information about a company, its managements and its prospects, and underwriters seek information from investors that will assist them in determining particular investors' interest in the company, assessing demand for the offering, and improving pricing accuracy for the offering. Investors' demand for an offering necessarily depends on the value they place, and the value they expect the market to place, on the stock, both initially and in the future. In conjunction with the road shows, there are discussions between the underwriter's sales representatives and prospective investors to obtain investors' views about the issuer and the offered securities, and to obtain indications of the investors' interest in purchasing quantities of the underwritten securities in the offering at particular prices. . . By aggregating information obtained during this period from investors with other information, the underwriters and the issuer will agree on the size and pricing of the offering, and the underwriters will decide how to allocate the IPO shares to purchasers.

2005 Guidance Statement, 70 Fed. Reg. at 19,674-75 (footnote omitted). Underwriters thus use this process to collect indications of interest regarding the IPO, as well as potential investors' views on the value of the proposed security. *See id.* at 19,675.

B

The SEC has noted that the book-building process can become a locus of IPO and IPO-aftermarket manipulation by

syndicate members.[5] *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,675. Underwriters have strong incentives to manipulate the IPO process to facilitate the complete distribution and sale of an issue. Underwriting is a business; competitive forces dictate that underwriters associated with successful IPOs will attract future issuers. Moreover, because underwriters assume a large measure of risk in the event an IPO fails, they have a direct interest in the IPO's success. *See* Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, Securities Act Release No. 8511, Exchange Act Release No. 50,831 (Dec. 9, 2004), 69 Fed. Reg. 75,774, 75,783-84 (Dec. 17, 2004) ("2004 Proposed Amendments").

Underwriters also have incentives to manipulate the price of securities in the aftermarket. Again, competition is one force at play: "Underwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss."[6]

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[5] The aftermarket is the period of trading commencing after the conclusion of the period of distribution of a security. *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,672 n.1. Generally speaking, the aftermarket period follows the termination of formal syndicate activity, also termed the "breaking of the syndicate." Trading Practices Rules Concerning Securities Offerings, Proposed Rules, Securities Act Release No. 7282, Exchange Act Release No. 37,094 (Apr. 11, 1996), 61 Fed. Reg. 17,108, 17,124 (Apr. 18, 1996).

[6] *See Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 798 (2d Cir. 2002) (reciting allegation that underwriters have an incentive to manipulate the aftermarket because they "attract future business based on the stock price performance of current public offerings"); *see also* Trading Practices Rules Concerning Securities Offerings, 61 Fed. Reg. at 17,124 ("Aftermarket participation may be an expected part of the underwriting services

(cont'd)

Staff Legal Bulletin No. 10: Prohibited Solicitation and "Tie-in" Agreements for Aftermarket Purchases, Division of Market Regulation (Aug. 25, 2000), *available at* http://www.sec.gov/interps/legal/ slbmr10.htm ("Staff Legal Bulletin No. 10"). Another incentive arises from underwriters' control over the allocation of securities. Persons or entities receiving allocations can make quick profits from an artificial rise in the immediate aftermarket during a "hot issue,"[7] and underwriters might "desire to allocate at least some shares to their best customers in order to maintain client relationships." IPO ADVISORY COMMITTEE REPORT 10.

Not all underwriter manipulations are prohibited: the securities regime tolerates "a little price manipulation" in order to further other goals. *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 28 (2d. Cir. 1985). The SEC has traditionally recognized certain types of manipulations, deemed "stabilizing" activities, as legitimate and permissible under section 9(a)(6) of the Exchange Act, 48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)), and SEC Rule 10b-1, 17 C.F.R. § 240.10b-1. Section 9(a)(6) makes it unlawful

> to effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange

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(... cont'd)

provided to an issuer, and the anticipated quality of such services can influence the issuer's selection of a managing underwriter.").

[7] "Hot issues" are securities "that generate a good deal of buying interest." 2 HAZEN, *supra* § 6.0, at 1-2. "In 'hot' IPOs, investor demand significantly exceeds the supply of securities in the offering and the stock trades at a premium in the immediate aftermarket." 2005 Guidance Statement, 70 Fed. Reg. at 19,672 n.5.

> for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)). In 1948, the SEC incorporated the prohibitions arising under section 9 and the rules and regulations thereunder into the definition of "manipulation" of section 10(b) of the Exchange Act, 48 Stat. at 891 (codified as amended at 15 U.S.C. § 78j(b)), thereby extending section 9's "stabilization" rules to securities not traded on exchanges. *See Manipulative and Deceptive Devices and Contrivances*, 13 Fed. Reg. 8183 (Dec. 22, 1948); 17 C.F.R. § 240.10b-1. Stabilization in the context of exchange trading and non-exchange trading has been continuously regulated and, to some extent, recognized as legitimate and permissible.[8]

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[8] *See, e.g.*, 1940 Statement, 11 Fed. Reg. at 10,974 ("Stabilization, it must be recognized, is now an integral part of the American system of fixed price security distribution."); Reports on Stabilizing Activities, 21 Fed. Reg. 501 (Jan. 21, 1956); Reports on Stabilizing Activities, 21 Fed. Reg. 2787 (Apr. 28, 1956); Manipulative and Deceptive Devices and Contrivances, Notice of Proposed Rule Making, 21 Fed. Reg. 9983 (Dec. 14, 1956); Reports on Stabilizing Activities, Notice of Proposed Rule Making, Exchange Act Release No. 9605, 37 Fed. Reg. 10,960 (June 1, 1972); Presentation of Records, Reports, and Forms for Reports on Stabilizing Activities, Exchange Act Release No. 9717 (Aug. 15, 1972), 37 Fed. Reg. 17,383 (Aug. 26, 1972); Amendments Relating to Reports of Stabilizing Transactions, Exchange Act Release No. 18,983 (Aug. 19, 1982), 47 Fed. Reg. 37,560 (Aug. 26, 1982); *Trading Practices Rules Concerning Securities Offerings*, 61 Fed. Reg. at 17,123-25.

Significantly, from its earliest statements on stabilization, the SEC has recognized that permissible forms of stabilization are limited to those attempts to maintain price levels of a security or to retard a decline in a security's price. In 1954, for instance, the Commission proposed new stabilization regulations that it viewed as "a formulation of principles which historically have been applied in considering questions relating to manipulative activity and stabilization in connection with a distribution." Manipulative and Deceptive Devices and Contrivances, 19 Fed. Reg. 2986, 2986 (May 22, 1954) ("1954 Proposed Rules"). These regulations limited permissible stabilizing bids to those with "the purpose of preventing or retarding a decline in the open market price of [a] security." *Id.*; *see Manipulative and Deceptive Devices and Contrivances*, 20 Fed. Reg. 5075 (July 15, 1955) (adopting the 1954 Proposed Rules as 17 C.F.R. § § 240.10b-6, 240.10b-7, and 240.10b-8). Likewise, in 1959, while issuing proposed amendments, the Commission commented, "The term 'stabilizing' has generally been accepted to mean the placing of any bid or the effecting of any purchase . . . for the purpose of preventing or retarding a decline in the open market price of a security." Manipulative and Deceptive Devices and Contrivances, Notice of Proposed Rule Making, 24 Fed. Reg. 9946, 9947 (Dec. 9, 1959) ("1959 Proposed Rules"). And, alongside a 1991 proposed rule, the Commission cautioned that "stabilization does not contemplate transactions in excess of those required to prevent or retard a decline in the market price, or those which raise the market price of a security . . . ." Stabilizing to Facilitate a Distribution, Securities Act Release No. 6880, Exchange Act Release No. 28,732 (Jan. 3, 1991), 56 Fed. Reg. 815 (Jan. 9, 1991) ("1991 Proposed Rules").

Permissible stabilization activities are often contrasted with activities raising prices, which are prohibited under section 9(a)(2) of the Exchange Act, 48 Stat. at 889 (codified as amended at 15 U.S.C. § 78i(a)(2)). For instance, in 1994,

the SEC engaged in a comprehensive review of its rules governing manipulation in securities offerings. *See* Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994), 59 Fed. Reg. 21,681, 21,681 (Apr. 26, 1994) ("1994 Review"). One section of the review dealt with stabilization and expressed the Commission's "concept" that "stabilization of offerings should be restricted in order to minimize its manipulative impact." *Id.* at 21,689. The 1994 Review explained that underwriters engage in various activities in the aftermarket—although the particular activities are not defined—and that some of those activities "may support, or even raise, the market price of the security." *Id.* The 1994 Review also recounted in its appendix that "Congress enacted the Exchange Act to put an end to the practices that it found had contributed to the economic problems facing the Nation." *Id.* at 21,694. "One of the 'chief evils,'" prohibited by section 9(a)(2), "was the operation of 'pools,' which were agreements among several persons to trade actively in a security, generally to raise the price of a security by concerted activity, in order to sell their holdings at a profit to the public, which is attracted by the activity or by information disseminated about the stock."[9] *Id.* at 21,694 n.3. The Commission expressly distinguished between section 9(a)(2), which covered absolutely prohibited manipulations, and section 9(a)(6), which covered manipulations that the SEC could choose to permit. *Id.* at 21,694-95 & nn.3, 14. The Commission noted that the prohibitions in section 9(a)(2) represented the "heart" of the Act. *Id.* at 21,694. The SEC currently regulates stabilization practices with SEC Rule 104,

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[9] The 1940 Statement explained that section 9(a)(2) prohibited certain "pool manipulations." 1940 Statement, 11 Fed. Reg. at 10,975-76.

which is part of Regulation M. *See* 17 C.F.R. § 242.104. That rule, consistent with historic SEC regulations, prohibits stabilization "except for the purpose of preventing or retarding a decline in the market price of a security." *Id.* § 242.104(b).

Among the impermissible manipulative practices regulated by the SEC is a general category of relationships between underwriters and prospective purchasers termed "tie-ins." "A 'tie-in agreement' in the securities offering context generally refers to requiring either implicitly or explicitly that customers give consideration in addition to the stated offering price of any security in order to obtain an allocation of the offered shares." 2004 Proposed Amendments, 69 Fed. Reg. at 75,783 n.95. Thus, the broadest category of tie-in arrangements includes all agreements requiring consideration from purchasers above the offering price. These have been termed *quid pro quo* arrangements. *See, e.g.*, Self-Regulatory Organizations, Notice of Filing of Proposed Rule Changes, Exchange Act Release No. 50,896 (Dec. 20, 2004), 69 Fed. Reg. 77,804, 77,805-06, 77,807, 77,810 (Dec. 28, 2004) ("2004 SRO Notice"). The *quid pro quo* consideration could, for instance, require customers to participate in another offering, including an offering in which supply exceeds demand, a "cold" offering.[10] *See* 2004 Proposed Amendments, 69 Fed. Reg. at

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[10] In 1974, the SEC proposed a rule that would expressly prohibit these aftermarket tie-in arrangements. *See* Certain Short Selling Of Securities and Securities Offerings, Exchange Act Release No. 10,636 (Feb. 11, 1974), 39 Fed. Reg. 7806, 7806-07 (Feb. 28, 1974) ("1974 Rule Proposal"); Certain Manipulative Practices in Public Offerings, Supplemental Notice of Proposed Rulemaking, Exchange Act Release No. 11,328 (Feb. 11, 1975), 40 Fed. Reg. 16,090, 16,090 (Apr. 9, 1975) ("Supplemental 1974 Proposed Rule"). The SEC withdrew the rule, however, because the tie-in arrangements prohibited by it were already prohibited by "existing

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75,783. "The Commission has long considered tying the award of allocations of offered shares to additional consideration to be fraudulent and manipulative, and such practices have always been actionable under Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act." *Id.* at 75,784; *see also id.* at 75,785 n.104.

In exchange for receiving an IPO allocation, certain tie-in arrangements require customers to place orders for aftermarket shares of the same security offered in the IPO. *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,672-73. These sorts of arrangements—sometimes described as arrangements to "pre-sell the aftermarket"[11]—can create artificial demand. They "generate[] additional aftermarket buying activity that is manipulative, in that it is designed to push the price higher once the security comes to the market." 2 HAZEN, *supra* § 6.3[2][A], at 1. Buying pressure created by pre-selling the aftermarket spills over into the IPO. *See* Staff Legal Bulletin No. 10. For some time, the SEC has

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antifraud and anti-manipulation provisions of the federal securities laws." Withdrawal of Proposed Rules Under the Securities Exchange Act of 1934, Exchange Act Release No. 26,182 (Oct. 14, 1988), 53 Fed. Reg. 41,206, 41,207 (Oct. 20, 1988) ("1988 Withdrawal"); *see also* 2004 Proposed Amendments, 69 Fed. Reg. at 75,784.

[11] *See* 2 HAZEN, *supra* § 6.3[2][A], at 30-31 ("Under this manipulation, registered representatives . . . require or encourage customers to commit to purchasing shares in the after market in order to get part of the allotment out of the original issue."); *id.* § 6.3[2][A], at 34-35 & n.68; NASDR, *Disciplinary Actions Reported for April*, 1999 WL 33176514, at *16 (NASDR Apr. 1999) ("The preselling of the aftermarket" occurred where respondents "solicited customers to purchase securities in aftermarket trading as a requirement to purchase in the IPO . . . .").

specifically recognized these arrangements as prohibited.[12] *See, e.g.*, 2005 Guidance Statement, 70 Fed. Reg. at 19,674.

A variation on tie-in agreements effectuating a pre-sale of the aftermarket are arrangements called "laddering." *See, e.g.*, 2005 Guidance Statement, 70 Fed. Reg. at 19,674 & n.29; "NASD Board Approves Proposed Conduct Rules for IPO Activities," NASD Press Room (NASD July 25, 2002), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_002921. Laddering has been defined "as inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations . . . ." 2005 Guidance Statement, 70 Fed. Reg. at 19,674 n.29 (emphasis added). Even more than pre-sales of the aftermarket, laddering agreements "stimulate[] demand for a hot issue in the aftermarket, thereby facilitating the process by which stock prices rise to a premium." REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 37-38 (Aug. 1984) ("Hot Issues Markets"); *see also* 2 HAZEN, *supra* § 6.0, 2005 Supp. at 31. "This conduct distorts the offering and the aftermarket." 2005 Guidance Statement, 70 Fed. Reg. at 19,674 n.29 (quotation marks, alterations, and citations omitted). The SEC has identified laddering

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[12] In 1961, the SEC addressed the impropriety of aftermarket pre-sale tie-in arrangements. *See* Securities Act Release No. 4358, Exchange Act Release No. 6536, 1961 WL 61584, at *1 (Apr. 24, 1961). The Commission understood that certain underwriters in IPOs had "been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue is initially sold." *Id.* The SEC used the statement to warn dealers that "generally speaking any such arrangement involved a violation of the anti-manipulative provisions of the Securities Exchange Act . . . and may involve violation of other provisions of the federal securities laws." *Id.*

agreements as a serious and harmful means of manipulation that "violates the antifraud and antimanipulation provisions of the federal securities laws." Hot Issues Markets 37-38;[13] *see also* 2005 Guidance Statement, 70 Fed. Reg. at 19,674.

II

With this background in mind, we turn to plaintiffs' complaints. The present appeal is the product of repeated consolidation. By an order entered November 1, 2001, the district court consolidated nine separate actions into a proceeding captioned "In re Initial Public Offering Antitrust Litigation" and appointed five law firms to lead the litigation. The resulting complaint (the "consolidated complaint") alleged violations of the Sherman Act and state antitrust laws. Along with that consolidated class action, the district court considered a separate class action captioned "Pfeiffer *v.* Credit Suisse First Boston Corp." *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 499. The *Pfeiffer* action alleged violations of the Robinson-Patman Act. The district court dismissed both actions in a single judgment, and we review that dismissal in this consolidated appeal.

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[13] In its Hot Issues Markets report, the SEC pointed to its 1961 statement, Securities Act Release No. 4358, Exchange Act Release No. 6536, 1961 WL 61584, as evidence that, "as early as 1961, the Commission indicated that tie-ins involve violation of the antimanipulative provisions of the securities laws." 1984 Hot Issues Markets 38 n.45. The report then documented a case in which a broker-dealer "required a substantial number of its customers to place aftermarket purchase orders for the company's stock at substantial premiums above the . . . offering price as a quid pro quo for obtaining shares in the underwriting." *Id.* at 39. The manipulation allowed the broker-dealer to quadruple the per share price "only a few hours after the commencement of aftermarket trading." *Id.* The report characterized this activity as involving "violations of various antifraud provisions." *Id.* at 38.

A

The plaintiffs in the consolidated complaint represent two groups of injured parties: direct IPO purchasers and aftermarket purchasers. The direct IPO purchasers claim to have paid anticompetitive charges for the securities of certain technology-related companies (the "class securities").[14] The complaint outlines a conspiracy among ten underwriting firms alleged to be leading underwriters of equity IPOs generally and, more specifically, leading underwriters of IPOs of technology-related companies.[15] The firms dominated or had market power in the markets of general equity IPOs and technology-related IPOs. According to the consolidated complaint, these firms agreed to exact anticompetitive consideration from direct IPO purchasers of the class securities in the form of tie-in arrangements. The tie-in agreements would require purchasers either: (1) to pay inflated commissions on trades of other securities, (2) to purchase the issuer's shares in follow-up or secondary public offerings, (3) to purchase less attractive securities, or (4) to execute laddering transactions.[16] "The amount of the required

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[14] The IPOs of these companies' securities range from March 1997 to December 4, 2000, and the securities' issuers include Amazon.com, eBay Inc., Priceline.com Inc., Red Hat Inc., and Global Crossing, among many others.

[15] The defendant firms are Bear, Sterns & Co., Inc., Credit Suisse First Boston Corp. ("CSFB"), Deutsche Bank Alex. Brown, Goldman, Sachs & Co., J. P. Morgan Chase & Co., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Morgan Stanley & Co., Inc., Robertson Stephens, Inc., and Salomon Smith Barney, Inc.

[16] For instance, plaintiffs Michele and Bill Lucia purchased 50 shares of Infonet Services Corp. common stock and 25 shares of Buy.com Inc. directly from Merrill Lynch as part of the Infonet IPO and Buy.com IPO respectively. In both cases, Merrill Lynch (cont'd)

consideration was frequently based upon a percentage of the profits obtained by the customer in connection with the, purchase of IPO shares." Consolidated Am. Compl. ¶ 6. The direct IPO purchasers claim they were injured by the conspiracy to impose these arrangements because, presumably, the conspiracy forced them to pay above-market consideration for securities.

The aftermarket purchasers claim to have purchased the class securities at prices intentionally "inflated" by defendants. Defendants allegedly inflated aftermarket prices by executing laddering agreements with direct purchasers, pre-committing their analysts to issue positive reports following the offering ("booster shots"), and "other overt acts which furthered the conspiracy's objectives by inflating the prices of class securities in the aftermarket." Consolidated Am. Compl. ¶ 61. The aftermarket purchasers claim injury from the purchase of artificially inflated securities.

Both groups of plaintiffs attribute their injuries to violations of section 1 of the Sherman Act and various state antitrust provisions.

B

The class action complaint in *Pfeiffer* asserts that certain underwriter and institutional defendants violated section 2(c) of the Robinson-Patman Act.[17] The complaint alleges that the

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allegedly required the Lucia's to agree to purchase additional shares of the respective securities in the aftermarket at inflated prices and subject to excessive commissions.

[17] The underwriter defendants are CSFB, Goldman, Sachs & Co., Lehman Brothers, Inc., Merrill Lynch, Morgan Stanley Dean Witter & Co., BancBoston Robertson, Stephens, Inc., and Salomon Smith Barney, Inc. The institutional defendants are Fidelity (cont'd)

underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities. The plaintiff class claims injury from the aftermarket purchase of inflated securities.

The purported "bribes" consisted of underwriter promises to make "exceptionally large" allocations of IPO securities in return for the institutional defendants' promises to comply with rules set by the underwriter defendants for the resale of the securities and to divide profits with them. Pfeiffer Compl. ¶¶ 74-75. The institutional defendants allegedly made several agreements: (1) that they would not sell the securities until ordered to do so by the underwriter defendants; (2) that they would give a third of profits made from the allocation to the underwriter who made the allocation; and (3) that they would make additional large aftermarket purchases of the securities and not sell those additional purchases until ordered to do so by the syndicate. Defendants—both the underwriter and institutional defendants—agreed that their research departments would issue continuous "strong buy," "buy" or "outperform" recommendations for the securities. Pfeiffer Compl. ¶ 91-101.

The complaint alleges that these actions had the effect of sustaining prices and driving them upwards. "When the market price for the . . . security had reached a high level and been sustained at the high level as long as it could, the syndicate departments for the Underwriter Defendants notified the Institutional Defendants that they were free to

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Distributors, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Inc., Janus Capital Corp., Comerica, Inc., Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

sell." Pfeiffer Compl. ¶ 108. The underwriter defendants then calculated the share of the profit due and collected those profits by receiving major business from the institutional defendants regarding unrelated securities and by charging the institutional defendants unusually large commissions.

C

Defendants moved to dismiss the complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. They argued that dismissal was proper because federal securities laws repealed the federal antitrust laws by implication and, moreover, preempted state antitrust laws. Defendants presented the immunity question as a choice between two regimes. The first, the antitrust laws, operate under a "competition-only standard." Tr. 12. The operation of the second, the securities laws, is reflected in the SEC's mandate to consider competition with the protection of investors, efficiency, and capital formation.[18] Defendants reminded the

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[18] Section 2(b) of the Securities Act provides:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Securities Act § 2(b) (as amended by the National Securities Market Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, § 106(a), 110 Stat. 3416, 3424) (codified at 15 U.S.C. § 77b(b)). Section 3 of the Exchange Act and section 2 of the Investment Company Act of 1940 contain similar provisions. *See* Exchange Act § 3(f) (as amended by NSMIA § 106(b), 110 Stat. at 3424-3425) (codified at 15 U.S.C. § 78c(f)); Investment Company Act of 1940, Pub. L. No. 76-768, § 2, 54 Stat. 789, 790 (as (cont'd)

court that "the IPO allocation process is . . . at the very heart of what the SEC regulates in promoting the capital raising function of the market" and that a syndicate making "a fixed price offering can be regarded as a per se antitrust violation unless it has the umbrella of regulatory protection." Tr. 7-8, 17. They argued that, because "exactly how far that umbrella extends is precisely the question of what the defendants can do in the capital raising function," antitrust immunity should cover the alleged conduct, and the court should thus reserve the question of appropriate capital raising activities for the expert agency, the SEC. Tr. 17. The SEC submitted an amicus curiae memorandum in support of defendants' immunity argument and noted "its past and continuing regulation of the IPO process, the syndicate system and various normally anticompetitive price stabilization techniques." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 506.

The plaintiffs viewed defendants' arguments as "all red herrings." Tr. 31. They urged that the district court did not have to usurp the policy position of the SEC or engage in rulemaking or line-drawing because defendants' misconduct had always been prohibited by the securities laws, was prohibited by the SEC, and, moreover, could never be permitted by the Commission. They argued that Congress created no express exemption to the application of the antitrust laws to defendants' anticompetitive behavior; finding implied immunity would be inappropriate since a repeal of the antitrust laws was not "necessary to make [the securities laws] work," *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). The United States (via the Department of Justice) and the State of New York (through the Office of

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amended by NSMIA § 106(c), 110 Stat. at 3425) (codified at 15 U.S.C. § 80a-2(c)).

the Attorney General) made amicus curiae submissions in support of plaintiffs' position. *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 506.

The district court granted the motion to dismiss. *See id.* at 499, 524-25. The court noted that the SEC explicitly permits much of the background conduct alleged in the complaints, including, most clearly, the syndicate system, *id.* at 506-08, the "road show" process, *id.* at 508-09, and communications among underwriters via the NASD and securities exchanges, *id.* at 509-10. The court thoroughly canvassed the SEC's relevant regulatory authority—including its exemptive powers—and the Commission's prior consideration of rules targeting the type of misconduct alleged. *Id.* at 510-21. The court held that implied immunity was appropriate because "the SEC, both directly and through its pervasive oversight of the NASD and other SROs [self-regulatory organizations[19]], either expressly permits the conduct alleged in [the complaints] or has the power to regulate the conduct such that a failure to find implied immunity would 'conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.'" *Id.* at 523 (quoting *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 149 (2d Cir. 2003) (second alteration in original)); *see also id.* at 524. The court dismissed the state claims on the theory that "reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antitrust scrutiny." *Id.* at 524; *see also In re Initial Pub. Offering Antitrust Litig.*, 2004 U.S. Dist. LEXIS 6248, Nos. 01 Civ. 2014(WHP), 01

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[19] "The term 'self-regulatory organization' means any national securities exchange, registered securities association, or registered clearing agency . . . ." Exchange Act § 3(f) (as amended) (codified at 15 U.S.C. § 78c(a)(26)).

Civ. 11420(WHP), 2004 WL 789770 (S.D.N.Y. Apr. 13, 2004) (denying motion to reconsider dismissal of state claims). Plaintiffs appeal.

III

The focus of this appeal is defendants' assertion of implied immunity. Thus, a review of the law of implied immunity is in order.

A

The basic contours of implied antitrust immunity jurisprudence are well-established. The analysis begins with the "cardinal principle of construction that repeals by implication are not favored." *Silver*, 373 U.S. at 357 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962). "The antitrust laws represent a 'fundamental national economic policy,'" *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)), and though, "to be sure, where Congress did intend to repeal the antitrust laws, that intent governs, . . . this intent must be clear," *id.* at 389 (citations omitted). Implied immunity will be found only in the face of a "plain repugnancy between the antitrust and regulatory provisions," *Gordon*, 422 U.S. at 682 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)); *see Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842), only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, "and even then only to the minimum extent necessary," *id. See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 145, 148. Despite these undisputed first principles, "the implied immunity cases resist definitive harmonization." 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP,

ANTITRUST LAW 39 (2d ed. 2000); *see Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (9th Cir. 1981).[20]

Our starting point is *Silver v. New York Stock Exchange*, a decision resolving an action by Harold Silver against the NYSE. 373 U.S. at 343, 345; *see Gordon*, 422 U.S. at 683 ("The starting point . . . [is] *Silver*."). Silver founded two non-member firms that sought wire connections with NYSE members. *Silver*, 373 U.S. at 343-44. The NYSE constitution provided the Exchange with the power to approve or disapprove any application for wire connections with any non-member and the ability to require the discontinuance of any connections. *Id.* at 354, 355 n.11. The NYSE granted certain member firms "temporary approval" to establish wire connections with Silver's companies but later decided to withdraw that approval. *Id.* at 344. The Exchange did not give notice prior to its decision to either Silver or his firms, and Silver sued the NYSE for violating the Sherman Act by conspiring with members to deprive Silver's firms of their private wire connections. *See id.* at 344-45. The Supreme Court presented the fundamental issue as "whether the Securities Exchange Act had created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability . . . ." *Id.* at 347.

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[20] The Ninth Circuit's opinion in *Phonetele*—the holding of which accords with our opinion in *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *see Phonetele*, 664 F.2d at 719 n.1—was authored by then-Circuit Judge Anthony Kennedy. Of implied immunity, Judge Kennedy wrote, "One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved." *Id.* at 727.

The *Silver* Court examined the tension between the free competition principles animating the antitrust statutes and "the public policy of self-regulation," *id.* at 367, created by the Securities Exchange Act, a policy that, "beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade . . . ."[21] *Id.* at 360. This tension, while problematic, did not imply that the Exchange should be totally exempt from the antitrust laws. *See id.* Specifically, in Silver's case, the SEC lacked the ability to review the challenged Exchange order. *See id.* at 358 & n.12, 360. The Court declined to find an implied repeal in the absence of anything "built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. It explained that "some form of review of exchange self-policing . . . [is] not at all incompatible with the fulfillment of the aims of the Securities Exchange Act," *id.* at 359, and that, at least in the absence of SEC review, the Court would apply the antitrust laws. *Id.* at 359-60. In a footnote, the Court stated that "a different case would arise" if the Commission had the power to review a challenged exchange action. *See id.* at 358 n.12.

Silver might be read to suggest the general principle that agency power to review—or, more specifically, to approve—private conduct immunizes that conduct from the antitrust laws, especially, perhaps, when the reviewing agency is

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[21] "The very purpose of an exchange is to exclude nonmembers from participation in trading. Were it not for the legislative authorization of such exchanges, they would constitute group boycotts that are *per se* violations of the Sherman Act." *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 314 (1973) (Marshall, J., dissenting).

concerned with competition. But Supreme Court precedents following *Silver*—in particular, *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—are to the contrary. *See* 1A AREEDA & HOVENKAMP, *supra*, at 11 ("The courts have made clear that even an express statutory mandate that an agency consider and give weight to preserving competition does not mean that a transaction approved by the agency confers an antitrust immunity."); *cf. Md. & Va. Milk Producers Assoc. v. United States*, 362 U.S. 458, 462-68 (1960); *United States v. Borden Co.*, 308 U.S. 188, 205-06 (1939).

Philadelphia National Bank, decided the same year as *Silver*, most clearly refutes this attractively simple reading of *Silver*. There, the Court refused to find implied antitrust immunity in a provision of the Bank Merger Act directing the Comptroller of the Currency to review and approve certain mergers in the public interest and, in so doing, to consider "the effect of the transaction on competition (including any tendency toward monopoly)."[22] *Philadelphia Nat'l Bank*, 374 U.S. at 332 n.8 (quoting the Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129, 129 (1960), *amended* by Act of Feb. 21, 1966, Pub. L. No. 89-356, 80 Stat. 7 (1966)). Specifically, the Court rejected the argument that the Bank Merger Act immunized Comptroller-approved mergers from section 7 of the Clayton Act.[23] *Id.* at 351. The Court

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[22] The Court noted that, under the Act, the Comptroller could "not give his approval [over a merger] until he has received reports from the other two banking agencies [(the Federal Deposit Insurance Corporation and the Federal Reserve System)] and the Attorney General respecting the probable effects of the proposed transaction on competition." *Id.* at 332.

[23] At the time that *Philadelphia National Bank* was under consideration, section 7 provided that

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declined to adopt the view of dissenting Justice Harlan that, because the commercial banking industry occupied a crucial role in the economy and had intimate connections to government operations, Congress had decided to remove antitrust issues from the courts and "place the responsibility for approval squarely on the banking agencies" for whom "competition was *not to be the controlling factor* in determining whether to approve a bank merger." *Id.* at 380, 382-83 (Harlan, J., dissenting).

Instead, Justice Brennan, writing for the Court, explained that the Bank Merger Act did not give rise to a sufficiently strong implication of repeal. The Court emphasized that Congress in other settings had expressly given agencies the power to grant immunity from the antitrust laws. *See id.* at 350& n.27 ("No express immunity is conferred by the Act . . . Contrast this with the express exemption provisions of, *e.g.*, the Federal Aviation Act, Federal Communications Act, Interstate Commerce Act, Shipping Act, Webb-Pomerene Act, and the Clayton Act itself." (citations omitted)). It also noted that the approval process did not require a factfinding process and that the Comptroller, although required to consider the effect of the merger on competition, was not

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> no corporation . . . shall acquire . . . the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Philadelphia Nat'l Bank, 374 U.S. at 323 n.1 (quoting 15 U.S.C. § 18 as that section read at the time).

required to give a particular weight to that consideration. Lastly, the legislative history failed to support or compel antitrust immunity:

> Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision . . .
>
> Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure . . . The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.

Id. at 351-52. Whereas *Silver* suggested that an agency's attention to competitive concerns might weigh in favor of implied repeal, *Philadelphia National Bank* found the opposite: "That there are so many direct public controls over unsound competitive practices in the industry *refutes* the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws." *Id.* at 352 (emphasis added). The Court left open the possibility that implied repeal might operate in other regulated industries, noting, for instance, that "bank regulation is in most respects less complete than public utility regulation." *Id.*

Yet, the Court refused to find implied antitrust immunity when a case concerning public utility regulation arose. *See*

Otter Tail Power Co., 410 U.S. at 372-75. In *Otter Tail Power*, the United States charged that Otter Tail Power had, *inter alia*, refused to interconnect its facilities with municipal utilities and to sell power to those utilities at wholesale. *Id.* at 368, 371. Section 202(b) of the Federal Power Act, 74 Pub. L. No. 333, ch. 687, Title II, § 213 (1935), 49 Stat. 848 (codified as amended at 15 U.S.C. § 824a(b)), authorized the Federal Power Commission ("FPC") to order Otter Tail Power to make a physical connection with, and to sell to or exchange power with, certain municipal utilities. *See Otter Tail Power*, 410 U.S. at 371, 373, 375-76 n.7. The FPC had actively considered the question of whether to permit Otter Tail Power to refuse to connect or whether to order interconnection and dealing, asking whether an order would be "necessary or appropriate in the public interest." *Otter Tail Power*, 410 U.S. at 371-73, 377. The Court explained that antitrust considerations could be relevant, though not determinative, to this "public interest" decision. *Id.* at 373. However, the *Otter Tail Power* Court found "no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations." *Id.* at 374-75. In reaching this conclusion, the Court first noted that FPC's authority to order interconnections was insufficient to oust antitrust laws: "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.* at 372. Then, like the *Philadelphia National Bank* Court, the Court looked to legislative history. *Id.* at 373-74. It found "nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws."[24] *Id.* at 373-74.

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[24] Even the dissent found the legislative history of predominant (cont'd)

Thus, in two cases involving agency review of private behavior—in which neither, unlike *Silver*, involved the actions of a registered exchange—the Court declined to find implied immunity despite agency considerations of competition. Both cases turned, at least in part, on the Court's stated inability to conclude that Congress had intended to immunize the reviewed acts.

The "different case" that *Silver* predicted finally came in *Gordon v. New York Stock Exchange*, an action concerning, like *Silver*, registered exchanges and specifically challenging the fixed-rate commissions of the NYSE and the American Stock Exchange ("AMEX").[25] *Gordon*, 422 U.S. at 660-61,

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import; it simply read the legislative history differently. *See id.* at 390-91 n.7 (Stewart, J., dissenting) ("For me, . . . the legislative history . . . is dispositive.").

[25] To be precise, the Court first discovered *Silver*'s "different case" in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302 (1973). In *Ricci*, the Supreme Court was presented with the question of whether consideration of an antitrust action against the Chicago Mercantile Exchange had to be stayed pending administrative proceedings before the Commodity Exchange Commission. *Id.* at 290-91. The *Ricci* Court termed "recurring" the problem of "conduct seemingly within the reach of the antitrust laws [that] is also at least arguably protected or prohibited by another regulatory statute enacted by Congress," where "often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations." *Id.* at 299-300. However, the *Ricci* Court never reached the implied immunity question. *See id.* at 302-04; *see also id.* at 308 (Burger, C.J., concurring and providing the fifth vote for the majority judgment) ("The Court's opinion should not be read to suggest that the Commission's resolution of the dispute either will or will not

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685; *cf. Kaplan v. Lehman Bros.*, 389 U.S. 954, 954-56 (1967) (Warren, C.J., dissenting from denial of petition for certiorari). The Court noted that the practice of setting fixed commission rates on stock exchanges began with the Buttonwood Trade Agreement of 1792 that created the NYSE. *Gordon*, 422 U.S. at 663. Congress was aware of the anticompetitive nature of that practice immediately prior to the passage of the Securities Exchange Act but, instead of prohibiting the practice, "gave the SEC the power to fix and insure 'reasonable' rates" in section 19(b)(9) of the Act.[26] *Id.* at 665-66. The *Gordon* Court granted defendants immunity. The case represents the Court's first major decision finding

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foreclose subsequent application of the antitrust laws."); *Gordon*, 422 U.S. at 688 ("*Ricci* . . . did not represent a decision on antitrust immunity . . . .").

[26] Section 19(b) of the Act as originally enacted provided the Commission with express authority to alter exchange rules "in respect of . . . the fixing of reasonable rates of commission." Securities Exchange Act § 19(b)(9), 48 Stat. at 898-99. It also required the SEC to determine that any alterations were "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded." *Id.* at 898. After the action in *Gordon* was filed, the Act was amended to expand SEC review of rules and rule changes by exchanges and other self-regulating organizations. *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, § 16, 89 Stat. 97, 146-50 (amending § 19 of the Securities Exchange Act) (codified as amended at 15 U.S.C. § 78s). The Act was also amended to require that, before the SEC approve the imposition by exchanges of a system of fixed rates, the Commission first conclude that such a system "did not impose any burden on competition . . . taking into consideration the competitive effects of permitting such . . . fixed rates." Securities Exchange Act § 6(e)(1)(B) (as amended by the Securities Act Amendments of 1975, 89 Stat. at 108) (codified at 15 U.S.C. § 78f(e)(1)(B)).

implied antitrust immunity in the securities context; to a great degree it forms the foundation of subsequent implied immunity jurisprudence.

Gordon of course began its appellate journey in the Second Circuit. *See Gordon v. New York Stock Exch.*, 498 F.2d 1303 (2d Cir. 1974). When this Court, like the Supreme Court, found implied immunity appropriate, we declined to rely on the existence of the SEC's review power alone. *Id.* at 1305. Rather, Judge Kaufman, writing for the Court, looked to "the language and the history of the 1934 Act, [which,] together with the sound policy behind supervised exchange self-regulation, mandated the conclusion that Congress intended to exempt from the antitrust laws the exchange practice of fixing commission rates." *Id.* at 1305-06. Of particular significance to us was "the congressional awareness that the provision would permit the Commission to fix rates," an awareness made manifest by the long tradition of fixing rates and the fact that this practice "was repeatedly acknowledged both in committee hearings and in the debates on the Act." *Id.* at 1307 (quotation marks and citations omitted); *see also id.* at 1309 (noting "Congress's expressed declaration"). Judge Kaufman distinguished *Philadelphia National Bank* on the basis of this legislative history.[27] *See id.* at 1310-11 n.11. He also noted that without implied immunity the SEC and antitrust courts could erect "conflicting standards," *id.* at 1307, that a specific provision of the Exchange Act expressly empowered the SEC to regulate rate-fixing, *id.* at 1307, 1310-11 & n.11, and that

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[27] This Court noted "that the history of the Bank Merger Act evidenced a congressional intent not to immunize bank mergers from at least Sherman Act attack, whereas the 1934 Act entrusts the SEC with supervision of rate-fixing, a practice which outside the confines of the 1934 Act is a per se violation of the Sherman Act." *Id.* at 1310-11 n.11 (citations omitted).

there was a robust history of "wide-reaching and systematic . . . recent SEC action regarding rate regulation," *id.* at 1308.[28]

The Supreme Court adopted this approach. Though the Court began by distinguishing *Silver*, it refused to equate SEC review over the challenged exchange conduct with implied immunity. *See Gordon*, 422 U.S. at 685 ("Having determined that this case is, in fact, the 'different case,' we must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here . . . ."); *see also id.* at 692 (Stewart, J., concurring). It thus acknowledged the fact of SEC regulation and then asked "whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Id.* at 688; *see also id.* at 691 (citing rationales for immunity).

Four interrelated insights informed the *Gordon* Court's conclusion that the Exchange Act "was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC." *Id.* at 691. First, the legislative history of the Exchange Act indicated that Congress specifically intended a repeal of the antitrust laws with regard to fixed rates. The Exchange Act, which expressly contemplates fixed commission rates, came seven years after the Court announced that price fixing was a *per se* violation of the Sherman Act, *id.* at 682; *see id.* at 693 (Stewart, J., concurring); *Phonetele*, 664 F.2d at 728; *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237 (2d Cir. 1975)

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[28] Additionally, the Court noted that "it seemed to us . . . that when something as crucial to the survival of the securities industry as its very ancient rate structure is at stake, diagnoses and changes must come from an agency with the Commission's expertise." *Id.* at 1309.

(Friendly, J.), and the legislative history established that Congress deliberately granted the SEC the express, specific power to fix rates, despite the obvious anticompetitive nature of such a power, *Gordon*, 422 U.S. at 663-67, 681. Second, in the absence of implied immunity, the exchanges might be left between the rock of antitrust liability and the hard place of specific SEC regulations—the exchanges "might find themselves unable to proceed without violation of the mandate of the courts or of the SEC."[29] *Id.* at 689. Third, precluding fixed commission rates "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates" of section 19(b)(9) by effectively mooting that subsection's provision of SEC review over rates. *Id.* at 691. Finally, the Court linked a history of regulatory approval of fixed rates to the possibility of congressional acquiescence, noting that "continued congressional approval" of the "long regulatory practice" of reviewing and authorizing fixed rates conflicted with any interpretation of the Act that did not imply antitrust immunity, *id.* at 690-91; *cf. id.* at 691-92 (Douglas, J., concurring):

> Since the Exchange Act's adoption, and primarily in the last 15 years, the SEC has been engaged in thorough review of exchange commission rate practices. The committees of the Congress, while recently expressing some dissatisfaction with the progress of the SEC in implementing competitive rates, have generally been content to allow the SEC to proceed without new legislation.

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[29] In a footnote, the Court explained that, although the SEC had never issued a formal order requiring fixed rates, its actions had "an effect equivalent to that of a formal order." *Id.* at 689 n.13.

Id. at 682. In light of these circumstances, repeal by implication was appropriate because it was possible to say that Congress had "unmistakably determined that, until such time as the Commission ruled to the contrary, exchange rules fixing minimum commission rates would further the policies of the 1934 Act." *Id.* at 693 (Stewart, J., concurring).

On the same day that *Gordon* was decided, the Court handed down the final opinion in its trilogy of implied immunity securities cases, *United States v. National Ass'n of Securities Dealers (NASD)*, 422 U.S. 694 (1975), a case involving the conduct of a self-regulatory organization, the NASD, and private anticompetitive conduct. *See id.* at 697. The defendants in *NASD* were the NASD, certain mutual fund companies, mutual fund underwriting firms, and securities broker-dealers trading in mutual fund shares. *Id.* at 700. The United States charged vertical and horizontal restraints of trade.[30] The vertical restraints included various restrictions on the trading of mutual fund shares in the "secondary market"—the market arising outside the "primary

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[30] Courts have discerned two major types of antitrust conspiracies to restrain trade: horizontal and vertical. Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market. Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 179 (2d Cir. 2004) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)).

market" of the initial distribution of mutual fund shares. *Id.* at 698-703. The Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789, "required broker-dealers to maintain a uniform price in sales in the primary market to all purchasers except the fund, its underwriters and other dealers." *Id.* at 699. The parties agreed that implied immunity therefore existed with regard to fixed sales in the primary market.[31] *Id.* But the United States charged that various agreements between principal underwriters and broker-dealers, as well as a single agreement between a fund and its underwriter, violated the antitrust laws by requiring maintenance of the public offering price in brokerage transactions and by prohibiting interdealer transactions. *Id.* at 702-03. The defendants agreed that the agreements were aimed at controlling the secondary market but argued they were immune under section 22(f) of the Act. That section provided that mutual fund companies could not restrict the transferability or negotiability of its issued securities "except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe . . . ." *Id.* at 721 n.33.

The Supreme Court agreed that immunity was implied in section 22(f). *Id.* at 720-22, 729-30. The Court first found that the section gave the SEC the express authority to regulate and permit restrictions of mutual fund sales in the secondary market, *see id.* at 722-27, and then concluded that this authority implied antitrust immunity, *see id.* at 721-22, 727-30. This conclusion was informed by at least two of the

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[31] A conclusion to the contrary would have left broker-dealers with competing mandates. If they maintained a uniform price, they could violate antitrust laws, but if they did not, they could violate the Investment Company Act. The parties' concession comports with the second insight of the *Gordon* Court.

insights made by the *Gordon* Court. First, congressional intent, as reflected in the legislative history and the structure of section 22 of the Investment Company Act, revealed "a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices." *Id.* at 727. The Court found that "Congress had made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual fund industry," *id.* at 729; *see id.* at 705-11, 722-27,[32] and concluded that therefore "the antitrust laws [had to] give way if the regulatory scheme established by the Investment Company Act [was] to work," *id.* at 729-30.[33] Second, passage of the Investment Company

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[32] *See also Phonetele,* 664 F.2d at 728 ("It is critical that the restraints so immunized were explicitly contemplated by statute.").

[33] The district court decision affirmed by the *NASD* Court found it "apparent that Congress designed [section 22] to create and protect a primary distribution system which is repugnant to the antitrust laws and did so in complete recognition of the fact that the legislation would frustrate the growth of a free secondary market." *In re Mutual Fund Sales Antitrust Litig.,* 374 F. Supp. 95, 109 (D.D.C. 1973), *aff'd, NASD,* 422 U.S. 694. The Supreme Court substantially agreed. *See NASD,* 422 U.S. at 724. It explained that the Investment Company Act resulted from an intensive study of the mutual fund industry, *id.* at 705-06, in which "the most prominently discussed characteristic [of the mutual-fund market] was the 'two-price system,' which [led to] an active secondary market under conditions that tolerated disruptive and discriminatory trading practices," *id.* at 706. The study revealed that "the two-price system did not benefit the investing public generally," *id.* at 707, and that the system led to a "bootleg market" and price wars that disrupted the established offering prices of mutual funds, *id.* at 709. The Act "was enacted with these abuses in mind." *Id.* at 709. Moreover, section 22(f) of the Act, the subsection in which the Court found implied immunity, had been (cont'd)

Act was followed by what the Court characterized as a long history of SEC acceptance of the anticompetitive behavior.[34] *See id.* at 727-28; *see also Phonetele*, 664 F.2d at 730. This regulatory practice was "precisely the kind of administrative oversight of private practices that Congress contemplated when it enacted § 22(f)." *NASD*, 422 U.S. at 728.

A separate count in *NASD* charged a horizontal conspiracy between the NASD and its members to prevent the growth of a secondary market in mutual fund shares. *Id.* at 701-02, 730. In the count as filed, the United States challenged three particular actions: (1) NASD rules encouraging restrictions on secondary market activities; (2)

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drafted by the SEC and considered by that agency as an "authority necessary to allow regulatory control of industry measures designed to deal with the disruptive effects of 'bootleg market' trading and with other detrimental trading practices identified in the [study]." *Id.* at 722. Funds were already imposing the challenged restrictions at the time that Congress passed the Act, *see id.* at 723, further suggesting that Congress was aware of and approved of the anticompetitive activity.

[34] The Court noted that the SEC "repeatedly had recognized the role of private agreements in the control of trading practices in the mutual-fund industry" and had even "looked to restrictive agreements similar to those challenged in the litigation [and] . . . at no point did it intimate that those agreements were not legitimate." *NASD*, 422 U.S. at 727 (footnote omitted). Indeed, historically, "the Commission had allowed the industry to control the secondary market through contractual restrictions duly filed and publicly disclosed," and "even the SEC's recently expressed intention to introduce an element of competition in brokered transactions reflected measured caution as to the possibly adverse impact of a totally unregulated and restrained brokerage market on the primary distribution system." *Id.* at 728.

NASD interpretations of its rules, similarly encouraging restrictions; and (3) activities of the NASD membership in encouraging the vertical restraints described in the other seven counts. *Id.* at 730-33. The Supreme Court recognized that section 22(f) of the Investment Company Act did not "authorize[]" these horizontal activities. *Id.* at 730. The Government withdrew its challenges on the NASD rules but asserted that "various unofficial NASD interpretations" and "extension[s] of the rules" inhibited a secondary market. *Id.* at 731-32. The Court, separating its analysis between the first two acts (the rules and their interpretations by the NASD) and the third (involving only NASD members), found the entirety of the challenged activities immune. *Id.* at 733-35. The SEC's exercise of regulatory authority was "sufficiently pervasive" to confer an implied immunity over both groups of horizontal activities within the count. *Id.* at 730.

The Court noted that the Government's withdrawal of its challenge to the NASD rules was "prudent." *Id.* at 732. It explained that the NASD's rules were impliedly immune due to the "extensive" "supervisory authority" of the SEC over the NASD. *Id.* at 732. The SEC had the power to determine if the NASD qualified for self-regulation, to review and approve any proposed NASD rules, and to request and order changes in or supplementation of those rules. Moreover, the SEC weighed competitive concerns in reviewing NASD rules and practices:

> Not only does the Maloney Act [(*i.e.*, the legislation that supplemented the SEC's regulation of the over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers, such as the NASD)] require the SEC to determine whether an association satisfies the strict statutory requirements of that Act and thus qualifies to engage in supervised regulation of the trading activities of its membership, it requires registered associations thereafter to submit for Commission approval any

> proposed rule changes. The Maloney Act additionally authorizes the SEC to request changes in or supplementation of association rules, a power that recently has been exercised with respect to some of the precise conduct questioned in this litigation. If such a request is not complied with, the SEC may order such changes itself.
>
> The SEC, in its exercise of authority over association rules and practices, is charged with the protection of the public interest as well as the interests of shareholders, and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility.

Id. at 732-33 (citations omitted). The Court concluded that "the investiture of such pervasive authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC."[35] *Id.* at 733. Furthermore, because the Court could "see no meaningful distinction between the Association's rules and the manner in which it construes and implements them," that is, because "each was equally a subject of SEC

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[35] As support, the Court relied in part on a footnote in a 1940 opinion by Justice Douglas that stated:

> The typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. . . See the Maloney Act providing for the formation of associations of brokers and dealers with approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 227 n.60 (1940) (citations omitted).

oversight," the Court found immunity over the challenged NASD interpretations of its rules as well. *Id.*

Finally, the *NASD* Court turned to the alleged horizontal agreements between the membership by which members sought to encourage restrictions on the secondary market. *Id.* The activities involved—although not authorized by the Investment Company Act, *id.* at 730—included actions to further the restrictions immunized under section 22(f), precisely the restrictions that the SEC had consistently approved pursuant to that section. *Id.* at 733; *see Phonetele, Inc.*, 664 F.2d at 729 & n.35. The "conspiracy" did not have the purpose or effect of restraining competition between funds. *NASD*, 422 U.S. at 733. Rather, as one court has explained, "the defendants horizontal conduct was logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to a regulatory command." *Phonetele*, 664 F.2d at 729. "This close relationship was fatal" to the Government's position. *NASD*, 422 U.S. at 733. The Supreme Court noted that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that [members] would be subjected to duplicative and inconsistent standards," *NASD*, 422 U.S. at 735, and held the challenge "likewise . . . precluded by the regulatory authority vested in the SEC by the Maloney and Investment Company Acts," *id.* at 733. *NASD* was the Supreme Court's last case on implied antitrust immunity.[36]

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[36] In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), however, the Supreme Court mentioned implied antitrust immunity, but only to note that such immunity was not available under the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, because that Act contained an antitrust-specific savings clause. *See Verizon Communications*, 540 U.S. at 406; *see also Law Offices of Curtis V. Trinko, L.L.P. v.*

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Much of the remaining judicial action in this area has been here at Foley Square. In addition to our opinion in *NYSE*, we have faced the question of implied immunity primarily in five cases. The first was *Northeastern Telephone Co. v. American Telephone and Telegraph Co.* [(*"AT&T"*)], 651 F.2d 76 (2d Cir. 1981). Northeastern Telephone Company was a small Connecticut company that entered the "interconnect industry" created in the wake of a 1965 Federal Communications Commission ("FCC") ruling. *See id.* at 79-80. That ruling required AT&T to permit customers to connect their own terminal equipment. *See id.*; *see also In re Use of Carterfone Device*, 13 F.C.C.2d 420, *recons. denied*, 14 F.C.C.2d 571 (1968). AT&T filed a proposed "tariff"[37] with the FCC requiring that all terminal equipment be interconnected through a "protective coupler arrangement" provided and serviced by local operating companies. *Northeastern Tel. Co.*, 651 F.2d at 80-81. The FCC allowed the tariffs to take effect without giving any specific approval to them, but, years later, the FCC invalidated the tariff. *Id.* at

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Bell Atl. Corp., 305 F.3d 89, 109 (2d Cir. 2002), *rev'd on other grounds sub nom. Verizon Communs. Inc.*, 540 U.S. 398.

[37] The [Federal Communications Act] provides for the regulation of telecommunications common carriers by the FCC and requires carriers to file tariffs with the FCC covering 'practices' as well as charges. Before changing any of its practices by filing a new tariff, the carrier must give ninety days notice to the FCC and the public. The requirement that carriers file tariffs is the primary mechanism of regulation. Once a tariff becomes effective, the carrier is required to adhere to its provisions.

Phonetele, 664 F.2d at 721-22 (footnotes omitted).

81. Northeastern Telephone Company sued AT&T under the Sherman Act, alleging that the protective couplers had been "intentionally overdesigned, making them unnecessarily expensive and subject to break down." *Id.* AT&T claimed that, because the tariff was subject to review by the FCC, AT&T was immune from antitrust liability. *Id.* at 82.

We rejected this defense. *Id.* Writing for the panel, Judge Kaufman recognized the "conflict between the Sherman Act's mandate of robust competition and the 'public interest' standard underlying governmental regulation of business activity." *Id.* That conflict triggered, but did not resolve, an implied immunity analysis. "The touchstone of this analysis," he emphasized, "is Congressional intent." *Id.* The Court made several important observations. First, the enabling act and its legislative history gave no indication of an intent to repeal. *Id.* at 83. Second, the Sherman Act did not "expressly authorize the FCC to approve protective coupler designs that unreasonably restrict competition" and thus was distinguishable from the provision of the Exchange Act considered in *Gordon* that was precisely targeted at fixing commission rates, an anticompetitive activity. *Id.* Expanding on this point, the Court stated, "While this observation is unsurprising, since protective couplers were unknown [at the time the enabling act was passed], it does rebut appellants' argument that immunity may be inferred on the basis of specific Congressional authorization." *Id.* Third, the Court reviewed the history of FCC regulation and emphasized that, although the agency clearly *could* have approved the couplers, the FCC had never granted its approval. *Id.* at 83-84. Therefore, we refused to immunize the tariff.

We considered implied antitrust immunity again in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985). Joseph Strobl asserted antitrust claims against defendants alleged to have fixed the market for potato prices. *Id.* at 23, 26. Defendants argued that their conduct, which violated the Commodity Exchange Act ("CEA"), was

immune under that Act from antitrust liability. *Id.* at 29. We easily rejected this defense because, as we explained, there was no conflict between the antitrust laws and the regulatory scheme erected by the CEA. *Id.* at 27. Moreover, the legislative history did not support an implied repeal. *Id.* at 28-29. The anticompetitive conduct alleged—price manipulation—was specifically forbidden by the CEA, and it was impossible to say that the two regimes were "repugnant" to one another. *Id.* at 27-28.

A more difficult question arose in *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990). There, Michael Finnegan, a shareholder of Federated Department Stores, Inc., sued R.H. Macy & Co. ("Macy's") and Campeau Corp. under section 1 of the Sherman Act. *Id.* at 825-26. He alleged that, after Federated Department Stores was "put into play" (*i.e.*, "offered for sale to the highest bidder"), Macy's and Campeau began bidding for the company. *Id.* at 826. However, as the bids climbed, the two companies made a mutually beneficial agreement to end the bidding war, enter a single bid, and split the company upon purchase. *Id.* Although Finnegan claimed that section 1 of the Sherman Act barred the conduct, the defendants asserted antitrust immunity, *id.* at 828, citing section 14 of the Exchange Act, which had been amended by the Williams Act, Pub. Law No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. § 78n). *Finnegan*, 915 F.3d at 828.

We explained that the Williams Act was directed at the "twin aims" of, first, maintaining neutrality between bidders and target companies and, second, protecting target shareholders by requiring that bidders make certain disclosures. *Id.* at 829. The Williams Act created disclosure requirements by amending section 14(d) of the Exchange Act. *Id.* These requirements were imposed on "person[s]," and the Act defined "person" to include any "group" acting with the purpose of acquiring securities. Williams Act § 3, 82 Stat. 456 (amending Exchange Act § 14(d)(1)-(2) (codified

as amended at 15 U.S.C. § 78n(d)(1)-(2))). The Williams Act also included an antifraud provision, allowing the SEC to regulate tender offers. *See Finnegan,* 915 F.2d at 830; Williams Act § 3, 82 Stat. 457 (amending Exchange Act § 14(e) (codified as amended at 15 U.S.C. § 78n(e))).

We concluded that the Williams Act impliedly repealed the antitrust laws with regard to the group bidding engaged in by Macy's and Campeau. *Id.* at 828. Three types of considerations informed our holding. The first centered on the structure of the Williams Act. Concentrating on amended section 14(d) of the Exchange Act, we found that "the logical implication" of the Act's definition of person to include a group was that the Act "contemplated agreements between bidders"—the very sort of agreement which, according to Finnegan's complaint, created antitrust problems. *Id.* at 829-30. Thus, we concluded, "in order for § 14(d) . . . to function as intended, such agreements [could not] be subject to suit under the antitrust laws . . . ." *Id.* at 830. We then turned to legislative history. We found that permitting joint bids, as long as they were disclosed, comported with the Williams Act's posture of neutrality between bidders, shareholders, and target company management. *Id.* at 831-32. Finally, we looked at the regulatory history. Joint bids were a common practice, and the SEC had permitted such bids so long as they were disclosed. *Id.* at 830-31. In light of all these considerations, we stated that, although the Williams Act would "not foreclose all antitrust claims arising in the context of market manipulation," it had implicitly repealed the Sherman Act in Finnegan's case. *Id.* at 828.

Our next case concerning antitrust immunity was *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002). The class action plaintiffs in *Friedman* were retail investors who had purchased securities in public offerings

and who contended that defendants had conspired to discourage the "flipping"[38] of stocks in an alleged violation of section 1 of the Sherman Act. *Id.* at 797-98. Plaintiffs asserted that defendants discriminated against retail investors with a history of flipping but did not hold institutional investors to the same standard. *Id.* "Although [the] plaintiffs alleged that the conspiracy had given rise to a host of improprieties, the only injury for which they [were] actually suing was the 'inflated' price they paid when they purchased the shares at the offering price." *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719, at *3 (S.D.N.Y. Dec. 8, 2000) (citations omitted). Defendants argued that the anti-flipping criteria—their implementation being a form of price stabilization permitted by the SEC—were impliedly immune. *Friedman*, 313 F.3d at 799. Importantly, section 9(a)(6) of the Exchange Act, 48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)), provided the SEC with the express authority to regulate stabilization, permitting or prohibiting stabilizing practices at its discretion. *Friedman*, 313 F.3d at 802-03.

We agreed with the defendants that the Exchange Act had impliedly repealed section 1 of the Sherman Act with regard to the alleged conduct. *Id.* at 803. As we noted, section 9(a)(6) expressly provided for regulation of stabilization practices. *Id.* at 802. Moreover, the SEC had long recognized certain stabilization practices as legitimate, including anti-flipping restrictions, and the restrictions were still permissible under SEC regulations. *Id.* at 801-03. Although

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[38] Flipping is the practice of reselling securities shortly after purchasing them in an IPO, *Friedman*, 313 F.3d at 797, that is, "buying a 'hot issue' and then selling it within a short period of time into a rising market, earning a quick profit on the transactions," *In re Account Mgmt. Corp.*, Exchange Act Release No. 36,314, 60 S.E.C. Docket 962, 1995 WL 579449, at *2 n.3 (Sept. 29, 1995).

the SEC had published a comprehensive review of its trading practice rules and posed certain questions about flipping, it did not choose to prohibit the anti-flipping restrictions in question. *Id.* at 801-02. This reflected a regulatory approach stretching back to 1940 when an SEC release indicated that anti-competitive stabilization practices would be lawful in the absence of Commission regulation. *Id.* at 802. In these circumstances, we found immunity implied in the Exchange Act.[39] *Id.* at 803.

The most recent implied immunity case in this circuit is *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134 (2d Cir. 2003). The plaintiffs in that case were purchasers of equity options who claimed that the defendants, various exchanges and exchange members, had unlawfully restrained trade in violation of section 1 of the Sherman Act by conspiring to restrict the listing and trading of particular options, so as to limit each listing of the option to a single stock exchange at a time. *Id.*

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[39] The *Friedman* court saw a direct analogy to *NASD*. *See id.* at 800 ("The facts in *NASD* are analogous to the case at bar . . . ."). This reference was appropriate because the second half of *NASD* dealt with a situation in which, *inter alia*, private individuals were charged with a conspiracy to engage in activities immunized by statute and permitted by SEC regulations. *See NASD*, 422 U.S. at 733. *NASD* held that, although the SEC could not permit the agreements among competitors to impose restrictions on the secondary market, those agreements remained beyond the realm of antitrust law because their aim was actually encouraged by Commission policies. *Id.* at 733-35. *Friedman* is analogous. The SEC did not have the authority to authorize the horizontal agreements alleged in *Friedman*, but would, and did, permit the anticompetitive conduct that was the purpose of those agreements—the imposition of an anti-flipping stabilization scheme.

at 138. In response, the defendants claimed immunity from the antitrust laws. *Id.* at 139.

We accepted the defendants' claim of immunity. *Id.* at 150. Our opinion highlighted the regulatory history and extensive interplay between the SEC and the exchanges with regard to the exclusivity of options listing. We noted that the SEC had "at times encouraged multiple listing and at times disapproved of that practice," *id.* at 150; *see id.* at 148 ("The Commission has taken varied positions with respect to the appropriateness of multiplicity . . . ."), including, for a time, approving exchange plans "for the single, or exclusive, listing of any new equity option," *id.* at 140. *Cf. Gordon,* 422 U.S. at 689 n.13 ("This degree of scrutiny and approval by the SEC is not significantly different . . . than an affirmative order to the exchanges to follow fixed rates."). Presumably, just as the SEC had approved exchange rules calling for exclusive listings, it could also have compelled such rules. *Compare* 15 U.S.C. § 78s(b)(1) ("No proposed rule change shall take effect unless approved by the Commission . . . ."), *with* 15 U.S.C. § 78s(c) ("The Commission, by rule, may . . . add to . . . the rules of a self-regulatory organization . . . ."). The Court concluded that antitrust principles directly conflicted with the SEC's encouragement and affirmative approval of exchange plans for exclusive listings.[40] *In re*

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[40] Our opinion also included a block quote from the *NASD* Court's discussion of a "pervasive" regulatory scheme. 317 F.3d at 147 (quoting *NASD,* 422 U.S. at 734-35). The characteristics of the SEC's review over the NASD that the Supreme Court termed "pervasive" in *NASD* were similar to characteristics of the exchanges at the time of *In re Stock Exchange Options Trading Antitrust Litigation. See Harding v. Am. Stock Exch., Inc.,* 527 F.2d 1366, 1369 n.4 (5th Cir. 1976). We did not expressly note this similarity.

Stock Exchs. Options Trading Antitrust Litig., 317 F.3d at 150.

The central question in the case was whether antitrust immunity was an available defense when the SEC changed its position to no longer permit exclusive listings. Importantly, we recognized the principle—consistent with the idea that antitrust repeal depends on congressional intent—that it was entirely possible for a practice to be currently prohibited by the SEC even though Congress impliedly repealed the antitrust laws with regard to it. *Id.* at 149. An SEC decision to prohibit certain activities could not logically strip those activities of immunity; if Congress intended to repeal the antitrust laws with regard to exclusive options listings, the SEC's eventual prohibition of that practice would not alter the original intent. *Id.* at 148-50.

C

The cases from the Supreme Court and this Court on implied antitrust immunity yield several principles. As an initial matter, we can parse the operation of immunity into "two narrowly-defined situations." *Id.* at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82). The first situation involves "pervasive regulation," while the second involves potential specific conflicts.

1

The first ground on which a court might find an implied repeal of the antitrust laws is "the vague ground of pervasive regulation." *Northeastern Tel. Co.*, 651 F.2d at 83; *see Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1378 n.4 (5th Cir. 1980). An implied repeal of the antitrust laws in this situation may arise "when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82 (citing *NASD*, 422 U.S. at 730)). This category of repeal is limited by the

"guiding principle that, where possible, 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Nat'l Gerimedical Hosp. & Gerontology Ctr.*, 452 U.S. at 392 (quoting *Silver*, 373 U.S. at 357 (alteration in original)).

Few cases have found an implied repeal on this "vague ground." *Northeastern Tel. Co.*, 651 F.2d at 83. The primary illustration of possible pervasive regulation is the situation where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive. *See NASD*, 422 U.S. at 730-33; *see also Austin Mun. Sec., Inc. v. Nat'l Assoc. of Sec. Dealers, Inc.*, 757 F.2d 676, 694-95 (5th Cir. 1985); *cf. In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 148-49.

But "pervasive regulation" may also be derivative. For instance, in *NASD* the Supreme Court concluded that horizontal agreements among competing NASD members to encourage vertical restraints in the mutual fund secondary market were entitled to implied immunity because the vertical restraints imposed by these horizontal agreements—which did not have the purpose or effect of restraining competition among funds—had been consistently approved by the SEC. *See NASD*, 422 U.S. at 733. As then-Judge Kennedy explained, the Supreme Court had "reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action." *Phonetele*, 664 F.2d at 729 (footnote omitted). The purpose of the challenged conspiracy actually coincided with the aims of the SEC, *NASD*, 422 U.S. at 733, and after the Court determined that the underlying restraints on the secondary market were immune it could then conclude that conduct enforcing those restraints was also immune, *id.* To ascertain whether the underlying vertical restraints were immune, however, the *NASD* Court had to employ the more

common immunity analysis described below. *See id.*; *cf. Friedman*, 313 F.3d at 797-98, 803.

2

The context in which implied immunity most often operates is best seen as one of potential specific conflict. It has been defined broadly as "when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82 (citing *Gordon*, 422 U.S. at 685-86, 688-89)). The most prominent examples of this type of immunity include the situation in *Gordon* and the immunity applied under section 22(f) of the Investment Company Act to the vertical restraints considered in *NASD*. All of our cases finding immunity have focused on a potential specific conflict of this nature. *See, e.g.*, *id.* at 150; *Friedman*, 313 F.3d at 802-03; *Finnegan*, 915 F.2d at 828-32; *cf. Strobl*, 768 F.2d at 29; *Northeastern Tel. Co.*, 651 F.2d at 83-84.

As suggested by our label—potential specific conflict—precedents have established that a potential conflict between the antitrust laws prohibiting a specific activity on the one hand and a regulatory regime compelling or permitting that activity on the other is a necessary component of implied immunity of this sort. Conflict will often arise because a regulatory regime operates by standards distinct from those of the antitrust laws. *See, e.g.*, *In re Stock Exchs. Options Antitrust Litig.*, 317 F.3d at 148; *Friedman*, 313 F.3d at 800 (noting that the Exchange Act allows "'a little price manipulation' to further goals such as efficiently raising capital through new issues"); *Finnegan*, 915 F.2d at 829. But an agency's power to review, if coupled with an *obligation to prohibit* particular anticompetitive conduct, will not create conflict. *See Strobl*, 768 F.2d at 27-28; *see also Gordon*, 422 U.S. at 692 (Stewart, J., concurring); 1A AREEDA & HOVENKAMP, *supra*, at 58 ("Ordinarily, the mere power to

prevent anticompetitive conduct will not immunize that conduct from the antitrust laws."). Rather, a conflict may arise when the agency has the *discretion to permit*[41] the activity by accepting or endorsing it as conforming with statutes or regulations particularly within the agency's sweep.

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[41] From a purely textual standpoint, within the word "permit" lurks the danger of assuming away the entire immunity analysis. The word has two possible meanings, one purely descriptive and the other functional, stating a legal conclusion. As a descriptor, permit denotes an agency's act of express or silent approval of some course of conduct. This descriptive use is generally consistent with this Court's and the Supreme Court's use of the verb in precedent. *See, e.g.*, *NASD*, 422 U.S. at 729 (noting the SEC's authority "to permit these and similar restrictive agreements"); *Gordon*, 422 U.S. at 674 ("the SEC permitted amendment to allow competitive rates"); *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 140 (describing SEC's consideration of whether "to permit" multiple options listings); *Friedman*, 313 F.3d at 799 ("The SEC has exercised its statutory authority in permitting—through the deliberate absence of regulation—defendants' conduct . . . .").

But the word "permit"—or its sister verbs "authorize" and "allow"—could also be understood as an equivalent to the verb "immunize": to permit the conduct *despite* the antitrust laws. In this sense it states a legal conclusion—that the SEC immunizes the conduct. We disclaim that usage of the verb here, and we do so to prevent readers from attributing a legal conclusion to a mere recitation of fact. Our use of the word "permit" is thus limited to describing what actions an agency authorizes under its regulatory regime, not, as the ultimate issue may be, under the antitrust laws. Whatever the merits of an immunity doctrine in which agency permission is the endpoint of analysis—and precedent does not support that doctrine, *see Otter Tail Power*, 410 U.S. at 371-76; *Philadelphia Nat'l Bank*, 374 U.S. at 321-33; *Northeastern Tel. Co.*, 651 F.2d at 83-84—we see no merit in harvesting legal principle from the empty wisdom of verbal imprecision.

See Strobl, 768 F.2d at 27-28. Our decision in *In re Stock Exchanges Options Trading Antitrust Litigation* establishes that it does not matter whether the agency currently permits the activity; conflict is possible so long as there is "potential" for the agency to permit it under its regulatory regime. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 149; *see also Friedman*, 313 F.3d at 799.

Conflict, however, is simply the essential starting point, and cases regarding potential specific conflicts have remained wedded to the idea that the touchstone of our analysis is, quite necessarily, inquiry into whether there is any evidence of an implicit congressional intent to repeal the antitrust laws. *See Northeastern Tel. Co.*, 651 F.2d at 82. In discerning that intent, courts examining potential specific conflicts have repeatedly turned to the four insights of the *Gordon* opinion. As noted above, the first is that legislative history or statutory structure may demonstrate that Congress contemplated repealing the antitrust laws with regard to specific anticompetitive conduct. *See Gordon*, 422 U.S. at 681-82; *see also NASD*, 422 U.S. at 705-11, 722-27. Thus, in *Friedman*, where we found implied immunity for stabilization practices, we noted that Congress was aware of similar practices when it passed the Exchange Act in 1934.[42] *Friedman*, 313 F.3d at 801; *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719, at *6, *11 (S.D.N.Y. Dec. 8, 2000); *see also Finnegan*, 915 F.2d at 829-30; *Phonetele*, 664 F.2d at 729-30.

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[42] The *Friedman* Court also noted that, soon after the passage of the Exchange Act, the SEC indicated its understanding that "anti-competitive practices were lawful in the absence of SEC regulation." 313 F.3d at 802. We stated that, at that early date, "the agency was aware of the antitrust implications of stabilization practices and the potential for direct conflict." *Id.*

The second insight is that a regulatory structure empowering an agency to compel action prohibited by the antitrust laws may imply that the antitrust laws are repealed with regard to that particular action. *See Gordon,* 422 U.S. at 689-90; *see also NASD,* 422 U.S. at 735; *In re Stock Exchs. Options Trading Antitrust Litig.,* 317 F.3d at 150; *Harding v. Am. Stock Exch.,* 527 F.2d 1366, 1369-70 (5th Cir. 1976); *cf. Otter Tail Power Co.,* 410 U.S. at 374 ("When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."). "In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates."[43] *Friedman,* 313 F.3d at 801. This insight sometimes overlaps with the doctrine of "conduct-based instrumentality immunity," which provides that actions compelled by a government agency's directives and policies are immune from the antitrust laws. *See Name.Space, Inc. v. Network Solutions, Inc.,* 202 F.3d 573, 580-84 (2d Cir. 2000).

The third recurring insight is that immunity may be appropriate if applying the antitrust laws would moot a statutory provision and rob the SEC of some grant of discretion. *See Gordon,* 422 U.S. at 689-90; *see also Finnegan,* 915 F.2d at 830. *Compare Gordon,* 422 U.S. at 689-90, *with Northeastern Tel. Co.,* 651 F.2d at 83. This

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[43] The Ninth Circuit has made the same insight. *See Phonetele,* 664 F.2d at 733 ("Where conduct is compelled by the regulatory agency, not implying antitrust immunity would be unfair to the regulated entity and would frustrate agency policies."); *cf.* 1A AREEDA & HOVENKAMP, *supra,* at 35 ("Conduct that is specifically *compelled* by the agency acting within its jurisdiction is generally immune.").

principle builds upon two modest assumptions about Congress: (1) that Congress was familiar with federal law, particularly the antitrust laws; and (2) that Congress would not write legislation without any effect. In other words, we do not "assume that Congress was so muddled that it gave with the right hand of securities regulation that which it then took away with the left hand of antitrust law." *Finnegan*, 915 F.2d at 826.

Finally, our cases have consistently looked to a regulatory history permitting, at some point, the challenged anticompetitive conduct. *See, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 139-42; *Friedman*, 313 F.3d at 800, 802-03; *Finnegan*, 915 F.2d at 831; *Northeastern Tel. Co.*, 651 F.2d at 83-84. The *Gordon* Court cited historical SEC review of fixed commission rates as evidence of continued congressional acquiescence,[44] *see Gordon*, 422 U.S. at 690-91, and a pattern of Commission approval of anticompetitive conduct supports the premise that Congress contemplated agency permission of the

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[44] This was a guiding principle for the Supreme Court majority in *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, the Court held that the "failure of Congress to modify [a series of] IRS ruling[s] . . . , of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the [IRS policy] when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the [IRS] rulings." *Id.* at 599. The Court cautioned that "nonaction by Congress is not often a useful guide," *id.* at 600, but explained that in some circumstances it is "hardly conceivable that Congress . . . was not abundantly aware of what was going on," *id.* at 600-01. *See id.* at 607 (Powell, J., concurring). *But see id.* at 612 (Rehnquist, J., dissenting) ("Regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for them.").

particular conduct.[45] The acquiescence argument is strengthened where the anticompetitive behavior is commonly accepted. *See, e.g., NASD,* 422 U.S. at 727-28; *Finnegan,* 915 F.2d at 830. Without fully explaining our underlying rationale, we have nonetheless consistently stressed that "implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law." *Friedman,* 313 F.3d at 799; *see id.* at 801-02 (reviewing regulatory history); *see also Phonetele,* 664 F.2d at 729 (stating that immunity "depends particularly on the specific regulatory history preceding a given lawsuit").

At the close of this arduous review of the law, it is important to recall that an implied immunity analysis always begins with the notion that repeal by implication is disfavored. *See Silver,* 373 U.S. at 357. Nonetheless, implied repeal may arise in the face of a clear repugnancy between antitrust and regulatory provisions but, importantly, only to

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[45] Although neither logically compelled nor universally true, it is probably fair to say that Congress is more likely to have contemplated repealing the antitrust laws with regard to anticompetitive conduct that at some point has been permitted by the SEC than conduct that has never been permitted. This inference flows from the fact that the concerns of an expert agency created by Congress are likely to share many of the concerns of the Congress that created it. *Cf. NASD,* 422 U.S. at 728.

It has also been suggested that "it would hardly be irrational for Congress to make antitrust immunity," at least in some circumstances, "depend on whether an agency actively supervised the challenged conduct," 1A AREEDA & HOVENKAMP, *supra,* at 43; *cf. Gordon,* 422 U.S. at 691-62 (Douglas, J., concurring) (arguing that immunity is only appropriate where "the SEC is actively and aggressively exercising its powers of review and approval"), but that is yet a more subtle implication.

the extent necessary to make the regulatory provisions work. *Id.* at 357. Thus, in the absence of the rare regulatory scheme pervasive enough to indicate that Congress forswore the paradigm of competition, *see NASD*, 422 U.S. at 730-33, immunity can arise only when there is a potential specific conflict between the antitrust laws and a regulatory regime, *see Northeastern Tel. Co.*, 651 F.2d at 82; *see also Strobl*, 768 F.2d at 27-28. In resolving that conflict, we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.[46] The mere power to "permit" an act as not violating a regulatory mandate does not alone immunize that act. *See Otter Tail Power*, 410 U.S. at 371-76; *Philadelphia Nat'l Bank*, 374 U.S. at 321-33; *Northeastern Tel. Co.*, 651 F.2d at 83-84.

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[46] This list is merely an expansion on the one we provided in *Northeastern Telephone Co.* In that case, Judge Kaufman explained, "Whenever claims of implied immunity are raised, they must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it." 651 F.2d at 83. The only gloss we add to this statement is a fleshing out of "the particular regulatory provision involved"—what we have deemed the second and third insights of *Gordon*.

D

One additional note is in order. *Silver* teaches that the securities statutes may alter the antitrust analysis in an antitrust defendant's favor even when those statutes imply no repeal of the antitrust laws. After the *Silver* Court denied the NYSE the defense of implied immunity, *see* 373 U.S. at 360-61, it did not apply the traditional *per se* rules of antitrust law, *see id.* at 347 (explaining that NYSE's actions would normally "constitute a *per se* violation of § 1 of the Sherman Act"); *id.* at 360-61. Applying "the rule of reason," the Court opined that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim," and asked whether the conduct before it was so justified. *Id.* at 360-61, 364; *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 126 (1973). We applied the same analysis to subsequent cases related to exchange regulation, asking whether anticompetitive exchange rules were nonetheless "germane" to the purposes of the securities laws and therefore permissible under the antitrust laws. *See Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237-40 (2d Cir. 1975) (Friendly, J.); *see also Drayer v. Krasner*, 572 F.2d 348, 356-58 (2d Cir. 1978) (Friendly, J.).

Thus, "just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration" in the application of antitrust law. *Verizon Communs.*, 540 U.S. at 412 (citation omitted); *see Jack Faucett Assoc., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 127 (D.C. Cir. 1984); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 999, 1009-10 (D.C. Cir. 1984); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1138 (7th Cir. 1983); *Phonetele*, 664 F.2d at 735, 737-38, 740-43; *cf. Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 819 (2d Cir. 1983); *Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1378-81, 1389-91 (5th Cir. 1980).

Then-Circuit Judge Kennedy recognized in *Phonetele* that, "while a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases." 664 F.2d at 737. The *Phonetele* decision also stated, "If a defendant can establish that . . . it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws." *Id.* at 737-38; *see id.* at 740-41 & n.63 (discussing *Silver* and *Jacobi*); *Jack Faucett Associates, Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 127; *S. Pac. Commc'ns Co.*, 740 F.2d at 1009.

We need not expound on the extent to which any of these or analogous principles would here preclude or qualify antitrust liability in the absence of implied immunity; the issue is not before us. But we highlight the principle endorsed elsewhere that, as a general matter, "the antitrust laws are not so inflexible as to deny consideration of governmental regulation," *Mid-Texas Commc'ns Sys.*, 615 F.2d at 1385, and that, as a leading treatise has put it:

> Antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1A AREEDA & HOVENKAMP, *supra*, at 12. These authorities "*are not* saying either that the antitrust laws do not apply in th[e particular] regulatory context, or that they somehow apply less stringently there than elsewhere. Rather, [they] are saying that, in light of regulatory rules, constraints, and practices," certain behavior classically deemed anticompetitive might not violate the antitrust laws. *Town of*

Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.); *see Mid-Texas Commc'ns Sys.*, 615 F.2d at 1389-90; *Drayer v. Krasner*, 572 F.2d at 356-58; *Jacobi*, 520 F.2d at 1237-40. Thus, it is possible that where a regulatory regime is "an effective steward of the antitrust function," the federal courts—in their considered application of the principles of antitrust law, rather than through an ousting of that law by statutory implication—may decline to intervene in private conduct because the benefits of intervention could be slight against a realistic assessment of costs. *Verizon Communs*, 540 U.S. at 413-14.

We make this note because the flexibility reflected in cases like *Silver*, *Phonetele*, and *Verizon Communications* lowers the stakes of any implied immunity evaluation. Tension may often develop between traditional antitrust analysis and the operation of a regulatory regime, even where the statute creating the regime carries no implication of a repeal of the antitrust laws. *See, e.g.*, *id.* at 411-15; *Silver*, 373 U.S. at 360-61; *Mid-Texas Commc'ns Sys., Inc.*, 615 F.2d at 1378-81, 1389-91. But a complete ousting of the antitrust laws is not the only means of resolving that tension. As one treatise has commented, although the doctrine of implied immunity is "not broad enough to eliminate every potential conflict between antitrust and regulatory policies," 1A AREEDA & HOVENKAMP, *supra*, at 98, "the antitrust laws are flexible enough to take into account the peculiarities of a regulated industry," *id.* at 7. *See Verizon Communs*, 540 U.S. at 411-12. In light of the flexibility of the antitrust laws, it is possible to maintain the focus of an implied immunity analysis on the question at issue: whether, and to what extent, a statute implies repeal of the antitrust laws.

IV

Against this backdrop of implied antitrust immunity jurisprudence, defendants advance two theories of implied immunity. First, they argue that immunity should be implied because the SEC has jurisdiction over the alleged conduct,

the SEC has actively exercised its authority to regulate the misconduct, and application of the antitrust laws would interfere with the Commission's ability to administer and refine the regulatory scheme. Second, they contend that the SEC's regulatory authority over the challenged conduct is sufficiently pervasive to oust the antitrust laws.[47] Plaintiffs dispute both theories. Plaintiffs' primary claim is that immunity is improper because there is no potential conflict with the securities laws. According to them, defendants cannot establish that the alleged conduct could ever be authorized under those laws.

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[47] Defendants also argue that immunity is appropriate with regard to the allegations arising in the consolidated complaint because the complaint details a host of conduct recognized as legitimate by the SEC—in particular, the use of syndicates and the book-building process. According to defendants, "If implied immunity were denied, plaintiffs would be free to attempt to establish their allegations of an unlawful conspiracy based on inferences from conduct that the SEC views as essential to capital formation." Defendants, however, cite no legal support for their argument, which essentially posits that implied immunity should apply whenever the evidentiary basis for an antitrust claim includes legitimate activity. Defendants ask us to conclude that, where the securities laws do not imply the repeal of the antitrust laws with regard to particular illegitimate anticompetitive conduct, the conduct nonetheless might gain immunity based on the mode of proof. We see no basis for grounding the immunity analysis in evidentiary considerations; the immunity question, after all, is whether "Congress has made a judgment that [certain] restrictions on competition" should be free from antitrust regulation. *NASD*, 422 U.S. at 729. The answer to that question will not vary with different evidentiary strategies. We thus reject defendants' argument. In so doing, we leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.

A

We begin with defendants' argument that a potential specific conflict necessitates immunity.

1

At the threshold, we are presented with a question of appellate practice. The issue of an implied immunity of this sort was the focal point of the briefing and argument in these cases, but plaintiffs have presented primarily an interpretation of the case law extending antitrust immunity over a broader set of conduct than we find supported by logic and precedent. Specifically, they suggest that immunity applies to whatever conduct the SEC could permit under its regulatory regime and therefore that immunity is inappropriate here because the SEC lacks the power to approve the alleged tie-in arrangements and conspiracies. Thus, they would have us resolve the question of the exact scope of the SEC's authority. We do not find it necessary to do so. Although we would agree with plaintiffs that the SEC must have authority to permit conduct before immunity of this sort attaches to it, we do not agree that, in the common case, the authority to permit, alone, will establish that a statute has impliedly repealed the antitrust laws. Hence, we would turn to a legal framework *more* favorable to plaintiffs than the doctrine they have pressed. Our initial concern is whether it is proper to look past plaintiffs' apparent concession as to the operative doctrinal framework and in turn whether to apply the proper principles of law. It is.

First, this Court unquestionably has the power to do so. It is well-established that "once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S.

439, 447 (1993). Accordingly, a concession on a question of law will not bind us. *See United States v. Tortorello*, 533 F.2d 809, 812 (2d Cir. 1976); *see also Squires v. Town of Islip*, 697 F.2d 66, 69 n.5 (2d Cir. 1982).

Second, ignoring plaintiffs' arguable concession is particularly apt here. To apply the immunity doctrine properly would not introduce a separate legal issue, *see, e.g.*, *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005); *Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 733-34, 741-42 (D.C. Cir. 1992), *rev'd on other grounds*, *United States Nat'l Bank of Oregon*, 508 U.S. 439, or even require that we turn to separate precedent. Moreover, resolving the immunity question in the manner the parties propose would require that we delineate what may be the periphery of the SEC's powers, a task we hesitate to undertake. And, by resolving the question of immunity posed by the parties in our own manner, we could in no way be said to be transforming ourselves into a "self-directed board[] of legal inquiry and research," but, rather, would quite clearly act "as arbiters of legal questions presented and argued by the parties before [us]." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

We simply find that the arguments on both sides proceed from fundamental, if understandable, misinterpretations of applicable precedents. In these circumstances, we refuse to apply the parties' false premises and to engage in the delicate task of setting the contours of SEC power. For us, it would be inappropriate to allow implied immunity—a quite complicated issue with few guiding precedents in this Circuit—to "vary from case to case depending on concessions." *Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999); *see Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir. 2003). Thus, we approach the question of immunities arising from potential specific conflicts with the framework established by precedent, not from that arguably stipulated to by the parties.

The parties' dispute, as has been suggested, centers on the scope of SEC power. Defendants forcefully argue, and the district court's opinion masterfully demonstrates, that the SEC has unquestionable jurisdiction over the tie-in agreements underlying plaintiffs' complaints. *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 506-23. Plaintiffs, however, assert that the SEC is unable to permit the alleged manipulation under the securities laws. Defendants vigorously challenge that assertion. This presents a much more difficult question, and the SEC proceeds with caution. Instead of joining defendants to say that the Commission could permit the charged conduct, it offers a qualified double negative—that, in its view, "current precedent does *not* . . . *foreclose* [its] ability in response to future developments to authorize conduct by underwriters that *could be characterized* as a tie-in or laddering." Letter from Amicus Curiae SEC, at 3 (emphasis added).

We need not resolve the bounds of SEC authority. Even if a specific potential conflict could be established, the crux of the implied immunity claim would remain: demonstration that Congress clearly intended a repeal of the antitrust laws. *See Nat'l Gerimedical Hosp. & Gerontology Ctr.*, 452 U.S. at 389; *see also Otter Tail Power*, 410 U.S. at 374-75; *Philadelphia Nat'l Bank*, 374 U.S. at 351-52; *see also Northeastern Tel. Co.*, 651 F.2d at 82; *cf. Gordon*, 422 U.S. at 688, 691. Here, there is no evidence of that intent.

First, there is no legislative history indicating that Congress intended to immunize anti-competitive tie-in arrangements. That fact alone is not determinative, but it does rebut any argument that immunity could be inferred from a specific congressional authorization. *Cf. Northeastern Tel. Co.*, 651 F.2d at 82. In both of the Supreme Court's cases finding implied immunity in the securities context, Congress had contemplated immunizing the specific anticompetitive activity from the antitrust laws. In *Gordon*,

Congress was aware of fixed rates and granted the SEC power to regulate them, *see* 422 U.S. at 685, and in *NASD*, the legislative history revealed that Congress had authorized the SEC to regulate restrictions imposed on trading in the secondary market for mutual funds in order to combat abuses caused by free competition, *see* 422 U.S. at 733. There is no similar legislative history in the case before us.

Second, this is not a case, like *Gordon* or *In re Stock Exchanges Options Trading Antitrust Litigation*, where the securities regime creates the potential for irreconcilable mandates. Quite simply, neither defendants nor the SEC contend that the Commission could compel the anticompetitive conduct the antitrust laws would prohibit. Whereas the Commission might have the power to impose fixed commission rates, *see Gordon*, 422 U.S. at 689-90, or to limit securities options listings to particular exchanges, *see In re Stock Exchs. Antitrust Litig.*, 317 F.3d at 148-50, defendants wisely do not insist upon the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations.

Third, defendants fail to identify a single provision, sentence, phrase, or word within the securities laws that would be "rendered nugatory" by application of the antitrust laws. *See Gordon*, 422 U.S. at 689-90. As this Court noted in *Gordon*, "the 1934 Act explicitly provided for the *fixing* of reasonable rates of commission." 498 F.2d at 1307 (quotation marks omitted). Application of the antitrust laws would have conflicted with that particularized grant of power to the Commission. Likewise, in *Finnegan* we found that using the antitrust laws to forbid joint bidding would conflict with the Williams Act's instruction that the SEC regulate "group" bids. 915 F.2d at 829-30. Here, by contrast, defendants acknowledge that the laws bringing tie-in agreements under

the SEC's jurisdiction "concern general, undefined subjects like fraud, deception, misrepresentation, and manipulation."[48] Defendants simply cannot identify any power or provision of the securities laws that will be mooted or even significantly curtailed by applying the antitrust laws to the conduct alleged in plaintiffs' complaints.

Finally, in every case in the securities context in which this Court or the Supreme Court has ever found implied antitrust immunity, the courts have done so in the wake of SEC authorization—whether past or present—of the specific anticompetitive behavior. Here, however, it is undisputed that "the Commission has never authorized tying and laddering . . . [or] even considered doing so." Letter from Amicus Curiae Department of Justice, at 2. Defendants argue that the SEC might be able to define "stabilization" under section 9(a)(2) of the Exchange Act to include these arrangements, but the Commission has never done so; rather, it has consistently limited the definition of "stabilization" to stabilizing activities that maintain securities prices or retard their decline, not manipulations that raise prices. *See Stabilizing to Facilitate a Distribution,* Proposed Rulemaking, Securities Act Release No. 6880, Exchange Act Release No. 23,732 (Jan. 3, 1991), 56 Fed. Reg. 814, 814-15 (Jan. 9, 1991) ("Stabilization consists of [conduct] . . . with a view to maintaining the price, or retarding the decline in price, of the security for the purpose of inducing the purchase by other persons of the offered security."); 1940 Statement, 11 Fed. Reg. at 10,973 ("[Stabilization] is, of course, a *negative* type of manipulation since it seeks to retard and not to create *affirmative* market movements."); *id.* at 10,976. *See generally Friedman,* 313 F.3d at 801-03. Moreover, the SEC "has long considered tying the award of allocations of

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[48] The SEC prohibits tie-in arrangements under those general provisions. *See supra* note 10.

offered shares to additional consideration to be fraudulent and manipulative, and such practices have always been actionable under Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act." 2004 Proposed Amendments, 69 Fed. Reg. at 75,783; *see id.* at 75,784 n.104. The Commission submitted to this Court that "it is difficult to envision the circumstances in which" conduct similar to that alleged in the complaint might be permitted. Letter from Amicus Curiae SEC, at 3. Indeed, when asked by this Court whether application of the antitrust laws could "impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions," the SEC noted only that "other cases could involve conduct presenting closer questions." *Id.* at 4. The conduct alleged in this case, clearly, is not permitted under SEC regulations.

We find no other indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements. Accordingly, we reject defendants' argument that implied antitrust immunity arises from a potential specific conflict between the antitrust laws and the securities laws.

B

Defendants also press a "pervasiveness" claim as a route to implied immunity. The district court characterized the SEC's authority over the anticompetitive conduct alleged in the complaint as "pervasive" but declined to hold that implied immunity was proper "under the *NASD* scenario." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 506. Defendants urge us to transform that characterization by the district court into our holding. In essence, they contend that immunity is proper here for the same reasons as in *NASD*. They assert that the SEC has the authority, capacity, and willingness to eliminate the misconduct, and that the SEC would weigh competitive concerns in doing so.

Defendants misread *NASD*. As we have explained, the Court's "pervasiveness" holding in *NASD* included two immunity considerations: one arising directly from the particular "pervasive" regulatory relationship between the SEC and the NASD, *NASD*, 422 U.S. at 732-33, and the other arising derivatively from the "fatal," "close relationship" between the alleged conspiracy and conduct the Court had already concluded was not only impliedly immune but actively encouraged by the SEC, *id.* at 733. Pervasive immunity of the second, derivative sort is impossible here, as the securities statutes do not specifically immunize the underlying tie-in arrangements. The only consideration, therefore, is whether the regulations here are "pervasive" like the SEC's regulations of the NASD were held to be in *NASD*.

Furthermore, defendants' attempt to analogize their relationship with the SEC to that at play in *NASD* falls far short. While it is true that both cases present extensive SEC regulation over the alleged misconduct, there is a significant distinction between who is being regulated and why. The *NASD* Court noted that the delegation of "pervasive supervisory authority" to the SEC suggested that Congress intended to lift the ban of the Sherman Act for *association activities approved by the SEC*. *See NASD*, 422 U.S. at 733 (citing *Socony-Vacuum Oil Co.*, 310 U.S. at 227 n.60). The NASD is a self-regulatory organization enjoying a special status that defendants cannot claim.

Indeed, the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities. The NASD itself serves as a semi-private regulator over the complex and unique securities industry but does so under the ever-watchful and omnipresent eye of the SEC. The SEC's authority over the NASD allows the Commission to review, approve, and order changes in the organization's rules. *Id.* at 732-33. Pervasiveness in this context in *NASD* revealed that the decisions of the regulated (*i.e.*, the NASD) could be seen as the acts of the regulator. Defendants have no

such relationship with the SEC. While their conduct may be subject to regulation and control by the SEC in great detail, that does not mean that the SEC approved those acts as it did in *NASD*.

At its core, defendants' pervasiveness argument is really that the law of antitrust must yield to the complexities of securities regulation in light of the SEC's substantial powers to regulate underwriter misconduct. The district court implicitly adopted this position, stating:

> The SEC, through application of its broad regulatory authority over the spectrum of conduct related to securities offerings, is empowered to regulate the conduct alleged by . . . plaintiffs. It is this sweeping power to regulate that spawns the potential conflict with the antitrust laws that, under *Friedman* and *Stock Exchanges Options*, requires a finding of implied immunity.

IPO Antitrust Litig., 287 F. Supp. 2d at 506. But the teaching of *NASD* is not that sweeping regulatory powers over private conduct render a regulatory scheme so "pervasive" as to immunize that conduct. If so, the vertical agreements charged in *NASD* would have been immunized under the rubric of pervasiveness as well. They were not. Instead, apart from the derivative immunity extended to private conduct pursued in accord with SEC policies, the Court limited pervasiveness to "association activities approved by the SEC." *NASD*, 422 U.S. at 733. Extensive regulation over the private conduct alleged here simply highlights the danger that anticompetitive conduct poses to the securities markets. *Cf. Philadelphia Nat'l Bank*, 374 U.S. at 352 ("The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition."). We will not halt operation of the antitrust laws on the rationale that

the misconduct equally threatens the markets for trading securities.

C

The claim of implied immunity in this case is, in many ways, unlike any we have seen. Tie-in agreements are recognized as means of dangerous manipulation, and there is no indication that Congress contemplated repealing the antitrust laws to protect them. Thus, defendants insist that the SEC could exercise powers—powers the agency refuses to recognize—to immunize conduct that neither Congress nor the agency has ever contemplated permitting.

There may be reasons why Congress might choose to immunize such conduct. The SEC and defendants have vigilantly reminded us that the securities markets *in toto* might be better entrusted to an expert agency than to the federal courts. While we might agree, we do not have the responsibility for making national policy. Congress knows how to immunize regulated conduct from the antitrust laws. To date, it has not done so here either expressly or impliedly. Construing the statutes as written, we find no repeal.

V

One issue remains. The district court determined that "reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antitrust scrutiny." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524. In light of our conclusion that the doctrine of implied antitrust immunity does not shield the alleged misconduct from antitrust scrutiny, this ruling cannot stand. While defendants forward alternate grounds to support the district court's dismissal, we decline to reach them and instead remand for consideration in the first instance by the district court.

VI

For the reasons stated above, the district court's judgment of November 6, 2003 is vacated, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION

01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP)

November 3, 2003, Decided
November 3, 2003, Filed

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

In this consolidated class action, two putative classes of plaintiffs seek redress for alleged antitrust injuries suffered as a result of purchasing initial public offering ("IPO") shares of certain technology-related securities (the "Class Securities") at artificially-inflated prices during the "dot-com boom" of the late 1990s. The first putative class (the "Sherman Act Plaintiffs") alleges violations of the Sherman Act, 15 U.S.C. § 1 et seq., and various state antitrust laws, by ten investment banks that underwrote the majority of the technology-related IPOs during this period.[1] The second putative class (the "Robinson-Patman Act Plaintiffs") alleges that these same practices, as well as those favoring long-term investors, constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

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[1] The ten "Underwriter Defendants" are Bear, Stearns & Co., Inc., Credit Suisse First Boston Corp., Deutsche Bank Alex. Brown, Goldman Sachs & Co., J.P. Morgan Chase & Co., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co., Inc., Robertson Stephens, Inc. and Solomon Smith Barney, Inc.

Currently pending before this Court is the Underwriter Defendants' consolidated motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action. For the reasons set forth below, their motion is granted on the ground that the conduct alleged by the Sherman Act Plaintiffs and the Robinson-Patman Act Plaintiffs is impliedly immune from antitrust scrutiny. Any other result would force the defendants to navigate the Scylla of securities regulation and Charybdis of antitrust law.

BACKGROUND

I. The Sherman Act Allegations

The gravamen of the Sherman Act Plaintiffs' Consolidated Amended Class Action Complaint (the "Sherman Act Complaint" or "Sherman Act Compl.") is that the Underwriter Defendants conspired to inflate the aftermarket prices of the Class Securities by using the fixed price equity underwriting system (the "syndicate system") to foist anticompetitive charges, as well as impermissible aftermarket "laddering" and "tie-in" arrangements, on direct purchasers of IPO shares in violation of federal and state antitrust laws. (Sherman Act Compl. ¶ 1.)

Specifically, the Sherman Act Plaintiffs allege that the Underwriter Defendants: (1) "required customers to pay . . . the IPO price for the relevant Class Security plus additional anticompetitive charges" (Sherman Act Compl. ¶ 4(a)); (2) "required customers to agree, in order to obtain IPO shares of Class Securities, to make 'tie-in purchases' of such Class Securities in the aftermarket at levels above the respective IPO prices," a process known as "laddering," in order to artificially inflate the aftermarket prices of the IPOs (Sherman Act Compl. ¶¶ 4(b), 6-7); and (3) utilized the preexisting syndicate system to implement and further their

antitrust conspiracy, through, inter alia, "road shows"[2] and other information sharing activity (Sherman Act Compl. ¶ 5). The anticompetitive activity alleged includes, inter alia, "non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in the follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), commitments to purchase other, less attractive securities, or the laddered purchases." (Sherman Act Compl. ¶ 6.)

According to the Sherman Act Plaintiffs, the purpose and effect of this conspiracy was to: (1) increase the consideration that aftermarket purchasers paid for the Class Securities above the levels that would have existed in a competitive market (Sherman Act Compl. ¶¶ 7-8, 70-74); and (2) create artificial demand for the Class Securities, thereby inflating their price with a concomitant increase in underwriting charges, commissions, and investment banking fees. (Sherman Act Compl. ¶¶ 70-74.) The Sherman Act Plaintiffs also allege violations of various state antitrust laws based on the same conduct. (Sherman Act Compl. ¶¶ 84-109.)

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[2] A "road show" is defined by the NASD as a "series of meetings with potential investors in key cities, designed and performed by a company and its investment banker as the company prepares to go public." NASD: Resources—Glossary, at http://www.nasd.com/ resources/glossary/r.asp. *See also Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 895 n.1 (5th Cir. 2002) (The "road show" process is "[a] series of presentations to investors describing an upcoming issue of securities. A road show is designed to drum up interest in the issue among potential investors.") (quoting David L. Scott, Wall Street Words 326 (Revised ed. 1997)).

II. The Robinson-Patman Act Allegations

The Robinson-Patman Act Plaintiffs allege violations of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), by most of the Underwriter Defendants, as well as certain institutional investors.[3] In their complaint (the "Robinson-Patman Act Complaint" or "Robinson-Patman Act Compl."), the Robinson-Patman Act Plaintiffs allege the same conduct as the Sherman Act Plaintiffs (Robinson-Patman Act Compl. ¶¶ 56-63, 90, 107-115), but add allegations that the Underwriter Defendants favored long-term investors over "flippers"[4] when allocating "hot issue" IPO shares. (Robinson-Patman Act Compl. ¶¶ 64-71, 74-89.) According to the Robinson-Patman Act Plaintiffs, this preferential treatment "tends to assure an excess of purchasers over sellers and to drive the market price of the securities upward." (Robinson-Patman Act Compl. ¶ 67.) The Robinson-Patman Act Plaintiffs further allege that the Institutional Defendants agreed not to "flip" their shares in exchange for favorable IPO allocations, and paid or received money for such allocations. (Robinson-Patman Act Compl. ¶¶ 24-35, 74-89, 116-26.) According to the Robinson-Patman Act Plaintiffs, these combined actions violate the commercial bribery prohibitions of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

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[3] The "Institutional Defendants" in the Robinson-Patman Act Complaint are Fidelity Distributors Corporation, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Janus Capital Corporation, Comerica, Inc., Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

[4] A "flipper" is defined in the Robinson-Patman Act Complaint as a "customer who sells his allocation of securities within twenty-four to forty-eight hours after purchasing them on the effective date of the offering." (Robinson-Patman Act Compl. ¶ 64.)

DISCUSSION

The Underwriter Defendants move to dismiss both the Sherman Act Complaint and Robinson-Patman Act Complaint on the grounds that: (1) the conduct alleged is immune from attack under federal and state antitrust laws; (2) plaintiffs lack antitrust standing; (3) plaintiffs' conclusory allegations of conspiracy are insufficient to state a valid claim; (4) plaintiffs fail to allege a relevant market; and (5) plaintiffs' state law claims are fatally defective. This Court's inquiry begins and ends with the doctrine of implied immunity.

I. Standards For A Motion To Dismiss

On a motion to dismiss, a court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor.[5] *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003). A court should not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);

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[5] Further, "in deciding a Rule 12(b)(6) motion, the Court may consider the following materials: (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003) (internal citations omitted).

accord Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997).

"This generous approach to pleading applies in the antitrust context." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997). Indeed, "in antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976)). However, a Court must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

"Finally, a complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense 'if the defense appears on the face of the complaint.'" *Color Tile*, 322 F.3d at 158 (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998)). Defendants' assertion of implied immunity is an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage. *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 150-53 (2d Cir. 2003) ("Stock Exchanges Options") ("Although the doctrine of implied repeal is sometimes described in terms of the district court's 'antitrust jurisdiction,' we think it is more properly viewed as conferring an immunity that is an affirmative defense.") (internal citation omitted).

II. The Doctrine Of Implied Immunity

The doctrine of implied immunity is grounded in the shibboleth that Congress does not intentionally vitiate its own regulatory mandates, and therefore "antitrust laws do

not come into play when they would prohibit an action that a regulatory scheme permits." *Finnegan v. Campenau Corp.*, 915 F.2d 824, 827 (2d Cir. 1990). At the intersection of securities regulation and antitrust law, the doctrine of implied immunity provides that federal securities laws impliedly repeal the Sherman Act with respect to certain conduct, and confer immunity from liability under the antitrust laws for that conduct. The doctrine, and the analytical framework to determine whether it applies in a particular situation, springs from a trilogy of Supreme Court opinions. *See United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) ("NASD"); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

Silver, the earliest of the cases, involved an antitrust challenge to a New York Stock Exchange ("NYSE") order enforcing an internal rule prohibiting direct communications with non-member firms. *Silver*, 373 U.S. at 343-44. The Supreme Court held that the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.* (the "*Exchange Act*"), did not impliedly repeal the antitrust laws with respect to this NYSE order because the Securities and Exchange Commission (the "SEC" or the "Commission") lacked jurisdiction "to review particular instances of enforcement of exchange rules." 373 U.S. at 364-67. The Court determined that, given the SEC's lack of authority over internal NYSE rules, there was no potential for conflict between the SEC's regulatory power and the antitrust laws, *Silver*, 373 U.S. at 358, and that "there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable," *Stock Exchanges Options*, 317 F.3d at 145 (discussing *Silver*, 373 U.S. at 358-59). The Court noted, however, that "should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Silver*, 373 U.S. at 360.

Recently, the Second Circuit noted that *Gordon*, decided more than a decade after *Silver*, was such a "different case." *Stock Exchanges Options*, 317 F.3d at 145. *Gordon* examined the practice of securities exchanges and their members employing fixed commission rates. 422 U.S. at 660-61. The Supreme Court held that implied immunity was warranted because the SEC had expansive regulatory authority over commission rate practices, which it had exercised actively. *Gordon*, 422 U.S. at 690 ("Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members . . . ."). The Court reasoned that even though the fixing of commission rates was prohibited by both the securities laws and antitrust laws at the time the case was heard, the SEC had the statutory authority to permit such conduct in the future should it choose to do so. *Gordon*, 422 U.S. at 690-91. Thus, "if antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." *Gordon*, 422 U.S. at 689.

The regulatory conflict in *Gordon* was more than theoretical because of the distinct mandates of the securities and antitrust laws. "Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689. The Court concluded that, as a result, the "interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Gordon*, 422 U.S. at 691. Thus, "failure to imply repeal would render nugatory the

legislative provision for regulatory agency supervision of exchange commission rates." *Gordon*, 422 U.S. at 691.

In *NASD*, decided the same day as *Gordon*, the Court determined that Congress' grant of regulatory authority to the SEC was "sufficiently pervasive" to confer on the defendants immunity from antitrust liability for activities restricting the transferability of mutual fund shares in the secondary market. *NASD*, 422 U.S. at 732. Although the Court found that the NASD's agreement to restrict the sale of mutual fund shares and fix their prices in the secondary market was not explicitly authorized under Section 22(f) of the Investment Company Act of 1940 (the "1940 Act"), 15 U.S.C. § 80a-22(f), Section 22(f) did authorize funds to impose transferability or negotiability restrictions subject to SEC disapproval. *NASD*, 422 U.S. at 729-30. Further, the Court held that the combination of the Maloney Act, 15 U.S.C. § 78o-3, and the 1940 Act conferred upon the SEC "broad regulatory authority . . . to monitor the activities [at issue], and the history of [SEC] regulations suggests no laxity in the exercise of this authority. To the extent that any of [defendants'] ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them." *NASD*, 422 U.S. at 734. Thus, the "pervasive regulatory scheme" created by the 1940 Act and the Maloney Act, which permitted transferability restrictions unless prohibited by the SEC, necessitated a finding of implied immunity. *NASD*, 422 U.S. at 732. Again, the Court held that immunity was required so that the SEC "could carry out [its] responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734-35.

When read together, *Silver*, *Gordon* and *NASD* yield "two narrowly-defined situations" in which the doctrine of implied immunity will apply: "'first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the

particular conduct challenged [the *Gordon* scenario], . . . and second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition [the *NASD* scenario].'" *Stock Exchanges Options*, 317 F.3d at 147 (quoting *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981)).

While the Supreme Court has identified these two situations in which implied repeal will apply, "it is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Therefore, "only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon*, 422 U.S. at 682 (quotation omitted); *accord Stock Exchanges Options*, 317 F.3d at 148 ("To be sure, antitrust immunity is not to be presumed from the mere existence of overlapping authority; rather the analysis must focus on the 'potential' for 'conflicts between the antitrust laws and a[n authorized] regulatory scheme.'") (emphasis and alteration in original) (quoting *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27 (2d Cir. 1985)). Accordingly, "implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law." *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002), *cert. denied*, 124 S. Ct. 152 (U.S. Oct. 6, 2003) (No. 02-1808); *accord Northeastern Tel.*, 651 F.2d at 83 (implied immunity "must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it").

Two recent Second Circuit decisions, *Friedman* and *Stock Exchanges Options*, have clarified the implied immunity doctrine in the context of the interrelationship between securities regulation and the antitrust laws.

The Second Circuit in *Friedman* concluded that, while the SEC did not expressly authorize broker-dealer restrictions designed to discourage "flipping" of IPO shares in order to

stabilize prices in the aftermarket, implied immunity from antitrust regulation was proper. 313 F.3d at 803. The court reasoned that "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." *Friedman*, 313 F.3d at 801.

In reaching its determination, the Second Circuit reviewed the "SEC's regulation of price stabilization in both the distribution and aftermarket phases of public offerings." *Friedman,* 313 F.3d at 801. The *Friedman* court noted that the Exchange Act gave the Commission authority to regulate the restrictive practices alleged by the plaintiffs, and that the Commission had repeatedly acknowledged its awareness of such conduct. 313 F.3d at 802. In addition, the Second Circuit noted that the Commission had exercised its authority over the conduct even though it had never prohibited it, because the Exchange Act "allows price stabilization practices that the SEC does not prohibit." *Friedman,* 313 F.3d at 802.

Discussing the conflict requirement inherent in consideration of implied immunity, the *Friedman* court held that:

> implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

313 F.3d at 801. Thus, the Second Circuit clarified that the "plain repugnancy" required to trigger implied immunity need not be a firefight between the antitrust laws and securities regulation, but rather "extends to potential as well as actual conflicts." *Friedman,* 313 F.3d at 799.

In the wake of *Friedman*, the Second Circuit in *Stock Exchanges Options* upheld antitrust immunity for the practice of restricting equity options trading to a single exchange. *Stock Exchanges Options*, 317 F.3d at 153. Although the conduct alleged was prohibited by both the antitrust laws and securities laws at the time the case was decided, the Second Circuit held the conduct impliedly immune on the grounds that "the SEC has ample statutory authority, which it has repeatedly exercised, to regulate the listing and trading of equity options," and the specific conduct at issue fell within that broader authority. *Stock Exchanges Options*, 317 F.3d at 150. As a result, "the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Stock Exchanges Options*, 317 F.3d at 149.

The *Stock Exchanges Options* court began by examining the history of the SEC's regulation of equity options trading, noting that the SEC has vacillated between allowing and prohibiting multiple option listing numerous times since the trading of options on national exchanges began in 1973. *Stock Exchanges Options*, 317 F.3d at 139-142. The Commission's oscillating approach to multiple option listing assisted the *Stock Exchanges Options* court in characterizing the broad scope of the SEC's authority:

> The SEC has ample authority, which it has repeatedly exercised, to regulate the listing and trading of equity options. It has at times encouraged multiple listing and at times disapproved of that practice. . . . Although the SEC's present stance is that agreements for exclusive listing are forbidden, the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. We see no way to reconcile that SEC authority, which may be exercised to permit agreements for exclusive listing of equity options, with the antitrust laws.

317 F.3d at 150.

Like the Sherman Act Plaintiffs, the plaintiffs in *Stock Exchanges Options* argued that the conduct at issue should not be immune from antitrust scrutiny because it was expressly prohibited by both SEC regulations and the antitrust laws at the time the action was filed. 317 F.3d at 144. The Second Circuit disagreed, holding that the broad scope of the SEC's authority over the listing and trading of equity options, rather than the fortuity of timing, was the touchstone for implied immunity:

> Although plaintiffs contend that an implied repeal is not needed to avoid conflicts here because exclusivity agreements are now prohibited by both the antitrust laws and the SEC, that contention misperceives the proper analytical focus. The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.

Stock Exchanges Options, 317 F.3d at 149. Thus, the Second Circuit in *Stock Exchanges Options* held the antitrust laws impliedly repealed based not on the existence of a current conflict between the particular SEC regulations and antitrust laws, but rather on the potential that future SEC regulation could conflict with the antitrust laws and expose defendants to inconsistent mandates. Citing *Gordon* and *NASD*, the *Stock Exchanges Options* court reasoned that:

> "Permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress," and that the "implied repeal of the antitrust laws is, in fact, necessary to" avoid "rendering nugatory the legislative provision for regulatory agency supervision." Thus, the proper focus is not on the Commission's current regulatory position but rather on the Commission's authority to permit conduct that the antitrust laws would prohibit.

Stock Exchanges Options, 317 F.3d at 149 (emphasis in original) (internal quotations omitted).

Friedman and *Stock Exchanges Options* have focused the inquiry concerning implied immunity by counseling that the power to regulate is tantamount to regulation. Thus, the *Gordon* threshold that antitrust laws and securities regulation be "plainly repugnant" is satisfied by potential, as well as actual, conflicts. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801.

III. Amicus Curiae Submissions

This Court invited, and received, amicus curiae briefs from the SEC and the Department of Justice, Antitrust Division (the "DOJ"), addressed to the issue of implied immunity. The SEC argues that implied immunity is required in this case, noting its past and continuing regulation of the IPO process, the syndicate system and various nominally anticompetitive price stabilization techniques. (Memorandum Amicus Curiae of the SEC ("SEC Amicus Br."), at 39-40.) The DOJ, in contrast, argues that implied immunity is improper in this case, and that antritrust scrutiny of the alleged conduct is necessary. (Memorandum of the United States as Amicus Curiae ("DOJ Amicus Br.") at 23.) In addition, this Court received an amicus curiae submission from the Office of the Attorney General of the State of New York, Antitrust Division (the "NYAG"), which largely echoes the position of the DOJ. (NYAG's letter submission as amicus curiae ("NYAG Amicus Br."), at 14.)

IV. Implied Immunity With Respect To The Sherman Act Plaintiffs

In its amicus brief, the SEC asserts that "the IPO allocation and commission practices challenged [by the Sherman Act Plaintiffs] fall within the very heart of the Commission's regulatory authority over underwriting syndicates under both the Securities Act of 1933, 15 U.S.C. 77a, *et seq.* [the "Securities Act"], and the [Exchange Act],

and they are comprehensively regulated." (SEC Amicus Br. at 1.) While this Court agrees with the SEC's contention that its regulatory authority over the conduct alleged in the Sherman Act Complaint is pervasive, it need not reach the question of whether there should be implied immunity under the *NASD* scenario. The reason is that the conduct alleged by the Sherman Act Plaintiffs is immune from antitrust scrutiny under a *Gordon* analysis, as informed by *Friedman* and *Stock Exchanges Options*. In the first instance, the SEC explicitly permits much of the conduct alleged in the Sherman Act Complaint. More importantly, the SEC, through application of its broad regulatory authority over the spectrum of conduct related to securities offerings, is empowered to regulate the conduct alleged by the Sherman Act Plaintiffs. It is this sweeping power to regulate that spawns the potential conflict with the antitrust laws that, under *Friedman* and *Stock Exchanges Options*, requires a finding of implied immunity.

A. Underwriter Conduct Permitted By The Securities Regulatory Regime

When the inflammatory characterizations are centrifuged from the Sherman Act Complaint, much of the conduct alleged is authorized under the current securities regulatory regime. For example, the Sherman Act Plaintiffs assert that the Underwriter Defendants engaged in a number of joint activities, including that: (1) the Underwriter Defendants "still regularly combined with one another during the Class Period into underwriting syndicates" (Sherman Act Compl. ¶ 38); (2) the Underwriter Defendants engaged in a secret "centralizing agreement" that the lead underwriter "could itself distribute all the shares of each Class Security" (Sherman Act Compl. ¶ 39); and (3) syndicate members who did not sell all of their allotment "nevertheless shared in the underwriters' discount" (Sherman Act Compl. ¶ 39). Those allegations, however, are nothing more than a theater-wide attack on the syndicate system, the predominant structure for the public distribution of equities since the infancy of the

securities markets. *See United States v. Morgan*, 118 F. Supp. 621, 635 (S.D.N.Y. 1953) ("The syndicate system as a means of issuing and distributing security issues was in use at least as early as the 1890's.").[6]

While the SEC's regulation of the syndicate system is generally accomplished through its direct regulation of the NASD and other self-regulatory organizations ("SROs"), the Commission itself expressly recognizes the validity of the syndicate system. *See, e.g.*, Exchange Act Release No. 17371, 21 S.E.C. Dkt. 930 (Dec. 12, 1980) (the "Papilsky Release") (providing an overview of the syndicate system and describing the "broad discretionary authority" typically granted to the managing underwriter by the "agreement among underwriters . . . that establishes the obligations of each [syndicate] member"). However, it is the SEC's pervasive regulatory oversight over the NASD, "the only national securities association' registered with the SEC pursuant to 15 U.S.C. § 78o-3," *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 242 (D.C. Cir. 2003), and other SROs, that is

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[6] For a detailed history of the syndicate system in the United States, this Court refers to then-District Judge Harold Medina's learned opinion in *Morgan*, 118 F. Supp. at 635-55. Briefly, a company desiring to sell stock to the public (an "issuer") hires an investment bank (the "managing underwriter") to effect the public distribution of shares at a fixed price agreed upon by the issuer and the managing underwriter (the "offering price"). In almost all instances, the offering price is set below the estimated market value of the stock to ensure its attractiveness to purchasers. The managing underwriter organizes an underwriting syndicate, which is a consortium of investment banks responsible for distributing shares to the public. The syndicate members make a concurrent public offering of the issuer's shares at the offering price, with uniform concessions at each level of the distribution. *See generally* 1 Louis Loss & Joel Seligman, Securities Regulation 328-34 (3d ed. 2003).

the cornerstone of the SEC's authority over the syndicate system. *See NASD*, 422 U.S. at 732 (SEC has "pervasive" authority over the NASD).

As a registered national securities association under the 15 U.S.C. § 78o-3, the NASD comprehensively and actively regulates syndicates—including their formation, communications among syndicate members, commission structure, allocation of securities and fee arrangements—pursuant to rules that are formally reviewed by the SEC and subject to its approval. *See* 15 U.S.C. § 78s(b) (requiring that all rules promulgated by SROs be approved by the SEC, and setting out procedures for review thereof); *accord Domestic Sec.*, 333 F.3d at 241 ("Under the [Exchange Act], the [SEC] must approve any changes to the rules of the [NASD]."). For example, NASD Rule 2110 and interpretation IM-2110-5, which prohibit certain forms of price coordination and intimidation as "inconsistent with just and equitable principles of trade," explicitly disclaim any limitation, constraint or other restriction on the "freedom" of broker-dealers to "engage in any underwriting (or any syndicate for the underwriting) of securities to the extent permitted by the federal securities laws." NASD Manual, IM-2110-5: Anti-Intimidation/Coordination; *see also* NASD Manual, Rule 2110: Standards of Commercial Honor and Principles of Trade.

Further, NASD Rule 2110 and interpretation IM-2110-1 combine to require all participants in an offering syndicate to make bona fide public distributions, and prohibit them from either withholding securities for their own benefit or using an allocation of securities to reward persons for future business. NASD Manual, Rule 2110; NASD Manual, IM-2110-1: Free-Riding and Withholding. However, that same combination of NASD Rule 2110 and interpretation IM-2110-1 explicitly permits syndicate participants to engage in communications "for the purpose of exploring the possibility of a purchase or sale of that security, and to negotiate for or

agree to such purchase or sale." NASD Manual, IM-2110-1. A number of other NASD rules and interpretations regulate various aspects of the syndicate system, including the actions of its broker-dealer participants.[7]

In addition to a general indictment of the syndicate system, the Sherman Act Plaintiffs brand as conspiratorial joint actions by the Underwriter Defendants during the "road show" process. For example, to support their conspiracy claim, the Sherman Act Plaintiffs allege that defendants: (1) "jointly and individually, hosted 'road shows' during which customers were introduced to the issuer and its managers and during which the offering was described"; (2) "conducted telephone calls, meetings and other regular communications prior to the IPOs of Class Securities;" and (3) "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." (Sherman Act Compl. ¶ 54.) Each of

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[7] *See, e.g.*, NASD Manual, Rule 2330: Customers' Securities or Funds (prohibiting NASD member firms from profitsharing in customer accounts); NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (governing public offering filing requirements, review process, and underwriter compensation); NASD Manual, Rule 2740: Selling Concessions, Discounts and Other Allowances (restrictions on selling concessions, discounts, or other allowances by members in connection with the sale of securities which are part of a fixed price offering); NASD Manual, Rule 2770: Disclosure of Price in Selling Agreements (mandating disclosure of public selling price, and any concessions thereto, in "selling syndicate agreements"); NASD Manual, Rule 4624: Penalty Bids and Syndicate Covering Transactions (requiring written notice of intention to impose penalty bids or conduct syndicate covering transactions by the syndicate manager).

these actions, however, are expressly permitted during the "road show" period.

While Section 5 of the Securities Act, 15 U.S.C. § 77e, imposes restrictions on non-exempt offerings of securities—including prohibitions on offers before a registration statement is filed, as well as limitations on oral and written communications with potential buyers after the registration statement is filed but before it becomes effective—Section 2(a)(3) excludes from those offering restrictions certain communications, including "preliminary negotiations or agreements between an issuer . . . and any underwriter or among underwriters who are or are to be in privity of contract with an issuer." 15 U.S.C. § 77b(a)(3). In addition, Securities Act Rule 134 permits broker-dealers to collect from potential buyers "indications of interest" in an IPO prior to its issuance. 17 C.F.R. § 230.134(d) (permitting broker-dealers to "solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate . . . whether he might be interested in the security").[8]

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[8] *See* also 17 C.F.R. § 242.101(b)(9) (exempting "offers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation" from restrictions on distribution participants during restricted period); 17 C.F.R. § 242.102(b)(5) (exempting "offers to sell or the solicitation of offers to buy the securities being distributed" from restrictions on activities by issuers and selling security holders during distribution); *Private Financial Network*, SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 77,332 (Mar. 12, 1997) (stating that electronic roadshow presentations transmitted over the internet to potential investors do not constitute a "prospectus" under the 15 U.S.C. § 77b(a)(10)); Institutional Investor Study of the SEC, H.R. Doc. No. 92-64, Pt. 5, at 2337 (1971) ("The expected level [of price] is influenced by the indications of interest [the underwriters] receive in response to their dissemination of the preliminary (cont'd)

Apart from their indiscriminate assault on the syndicate system and various "road show" practices, the Sherman Act Plaintiffs also seek to support their claim of an "unlawful agreement" by alleging that the Underwriter Defendants "frequently communicated with one another as members of the [NASD] where they jointly participated in the trading of securities on . . . NASDAQ, and are members of various national and regional exchanges, including the [NYSE] . . . and the American Stock Exchange ('AMEX')." (Sherman Act Compl. ¶ 47.) However, the Sherman Act Plaintiffs ignore the fact that the SEC not only permits such conduct, it requires that broker-dealers be members of, or employ, one of these SROs.[9] In addition, the Sherman Act Plaintiffs allege

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prospectuses and oral inquiries."); *Offers and Sales of Securities by Underwriters and Dealers*, Securities Act Release No. 4697, 1964 WL 68261, at *2 (May 28, 1964) (during the period after the filing and before the effective date of the registration statement, a broker-dealer "can orally solicit indications of interest or offers to buy and may discuss the securities with his customers and advise them whether or not in his opinion the securities are desirable or suitable for them"); *Publication of Information Prior to or After the Effective Date of a Registration Statement*, Securities Act Release No. 3844, 1957 WL 3605, at *2 (Oct. 8, 1957) (publication of information prior to or after effective date of registration statement, including restrictions on communications during waiting period); cf. 17 C.F.R. §§ 230.137 to 139 (permitting certain communications through issuance of research reports); 17 C.F.R. § 230.460 (in context of requests for acceleration of the effective date of a registration statement, recognizing the role of underwriters in disseminating information about the offering and the issuer).

[9] *See* 15 U.S.C. § 78o(b)(8) ("It shall be unlawful for any registered broker or dealer to effect any transaction in . . . any security . . . unless such broker or dealer is a member of a

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that the Underwriter Defendants communicated and worked together as market makers (Sherman Act Compl. ¶ 45), conduct that is also expressly permitted under the current securities regulatory regime.[10]

As each of the aforementioned activities alleged in the Sherman Act Complaint are expressly permitted under the current securities regulatory regime,[11] a determination by a

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securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member."); *see also* 15 U.S.C. § 78c(a)(26) ("The term 'self-regulatory organization' means any national securities exchange, registered securities association, or registered clearing agency."); 15 U.S.C. § 78f (governing registration and operation of national securities exchanges); *cf. Barbara v. New York Stock Exch.*, 99 F.3d 49, 51 (2d Cir. 1996) ("The [NYSE] is a nonprofit New York corporation registered with the [SEC] as a national securities exchange pursuant to . . . 15 U.S.C. § 78f . . . [and] a 'self-regulatory organization' [under] 15 U.S.C. § 78c(a)(26)."); *Feins v. AMEX*, 81 F.3d 1215, 1218 (2d Cir. 1996) ("AMEX is registered as a national securities exchange pursuant to . . . 15 U.S.C. § 78f, and is a 'self-regulatory organization' as defined by . . . 15 U.S.C. § 78c(a)(26).").

[10] *See* NASD Manual, Rules 4600 to 4652: NASDAQ Market Maker Requirements, esp. Rule 4611: Registration As A Nasdaq Market Maker (noting that "quotations and quotation sizes may be entered into The Nasdaq Stock Market only by an Association member registered as a Nasdaq market maker") (emphasis added); 17 C.F.R. § 242.103 ("This section permits broker-dealers to engage in market making transactions in covered securities that are Nasdaq securities without violating the provisions of § 242.101.").

[11] Other actions alleged in the Sherman Act Complaint, while not expressly permitted, are not prohibited by any SEC or SRO regulation. These include allegations that the Underwriter Defendants: (1) collaborated with one another in trade associations

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court that any of them constituted an antitrust violation would bring the antitrust laws into direct conflict with the securities laws. This species of "plain repugnancy between the antitrust and regulatory provisions" would, in the absence of a finding of implied immunity, "render nugatory the legislative provision for regulatory agency supervision." *Gordon,* 422 U.S. at 682, 691.

B. The SEC's Power To Regulate The Conduct Alleged In The Sherman Act Complaint

Although much of the conduct alleged in the Sherman Act Complaint is expressly permitted under the current securities regulatory regime, *see supra* Section IV.A, certain alleged conduct could be deemed prohibited under both the securities laws and the antitrust laws. For example, the Sherman Act Plaintiffs allege impermissible "tie-in" and "laddering" arrangements (Sherman Act Compl. ¶¶ 4(b), 7), as well as "commissions on the purchase and sale of other securities, purchases of an issuer's shares in the follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), [and] commitments to

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such as the Securities Industry Association (Sherman Act Compl. ¶ 46); (2) held meetings among top investment bankers, legal officers, and marketing managers (Sherman Act Compl. ¶ 48); (3) disclosed to each other the identities of the customers to whom they allocated, or intended to allocate, offered securities (Sherman Act Compl. ¶ 56); and (4) maintained systems that promptly informed defendants of commissions, charges, and other payments that their customers were making and the customers' commissions-to-equity ratios and turnover ratios (Sherman Act Compl. ¶ 62). In its amicus submission, the SEC represents that "none" of the aforementioned activities "are improper under the governing regulations." (SEC Amicus Br. at 35-36.)

purchase other, less attractive securities, or the laddered purchases." (Sherman Act Compl. ¶ 6.) While this conduct, under certain circumstances, could be deemed violative of the securities laws, such a finding would not be fatal to a conferral of implied immunity. This is because the SEC has broad power to regulate the conduct at issue in this case, and therefore potential conflicts exist even between activities that are, at the current time, prohibited under both the securities and antitrust regulatory regimes. Under the Supreme Court trilogy of *Silver*, *Gordon* and *NASD*, as interpreted by the Second Circuit in *Friedman* and *Stock Exchanges Options*, such potential conflicts require a finding of implied immunity. *See Stock Exchanges Options*, 317 F.3d at 149 ("The proper focus is not on the Commission's current regulatory position but rather on the Commission's authority to permit conduct that the antitrust laws would prohibit."); *Friedman*, 313 F.3d at 799 ("The 'plain repugnancy', or conflict, between antitrust and securities laws extends to potential as well as actual conflicts.").

The broad general authority to regulate IPO allocation and underwriter commission practices is granted to the SEC by: (1) the Securities Act, under which the Commission regulates the offering process; (2) the Exchange Act, under which the Commission defines and regulates manipulative acts in connection with the purchase or sale of securities; and (3) its reservoir of rulemaking authority over SROs. Indeed, according to the SEC, these practices "fall within the very heart of the Commission's regulatory authority over underwriting syndicates." (SEC Amicus Br. at 1.)

1. The Broad Scope Of The SEC's Authority Sets The SEC Apart From Other Federal Regulatory Agencies

The SEC's power to regulate all aspects of the national securities markets is integral to the system of capital formation in the United States. The architecture of the securities regulatory regime, and Congress' sweeping grant

of rulemaking and enforcement authority to the SEC, differentiates the Commission from other federal regulatory agencies.[12] Therefore, the Sherman Act Plaintiffs' reliance on *Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985), and similar cases is misplaced.

In *Strobl*, the Second Circuit found that implied immunity was not warranted where the alleged manipulative conduct violated both the *Commodities Exchange Act* (the "CEA") and the Sherman Act. 768 F.2d at 31. *Strobl*, however, presents a very different case than the current action in that "price manipulation is an evil that is always forbidden under every circumstance by both the [CEA] and the antitrust laws . . . [and] therefore, application of the latter cannot be said to be repugnant to the purposes of the former." 768 F.2d at 28. As such, no potential conflict could arise between the antitrust laws and the CEA since both have competition as their sole statutory goal.

In contrast, the securities laws take into consideration more than just free competition, and in fact permit price manipulation in certain instances despite its effect on competition. *See* S. Rep. No. 94-75, at 13 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 191 (noting that Commission's

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[12] *See, e.g.*, H.R. Rep. No. 73-1383, at 6-7 (1934) ("In a field where practices vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the [SEC] have been found practically essential."); S. Rep. No. 73-792, at 5 (1934) ("From the outset, the Committee has proceeded on the theory that so delicate a mechanism as the modern stock market cannot be regulated efficiently under a rigid statutory program. Unless considerable latitude is allowed for the exercise of administrative discretion, it is impossible to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business.").

"explicit obligation to balance . . . the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions.") (emphasis added); *Finnegan*, 915 F.3d at 825-26 ("It is recognized that competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established public policies."); *see also* 15 U.S.C. § 78o-3(b)(9) (national securities association may not impose "any burden on competition not necessary or appropriate in furtherance of the purposes" of the Act). The breadth of the SEC's authority, in conjunction with its unique mandate to balance competition with other market concerns, increases the likelihood of conflict with antitrust laws, and thus weighs heavily in favor of granting implied immunity where the securities regulatory regime, rather than a relatively narrow statute such as the CEA, is implicated.[13]

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[13] The same analysis undermines the Sherman Act Plaintiffs' reliance on *Law Offices of Curtis Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 109 (2d Cir. 2002) (rejecting implied immunity under the 1996 Telecommunications Act where the Act was intended to "throw[] all aspects of the industry open to competition and thus antitrust analysis" and contained a "specific savings clause, which specifies that 'nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.'") (internal quotations omitted), *cert. granted in part*, 538 U.S. 905 (2003) (No. 02-682).

2. The SEC's Power To Regulate Under The Securities Act

The Securities Act provides the SEC with plenary authority to regulate the initial public offering of securities. First, the SEC has power to regulate all aspects of the syndicate system. *See supra* Section IV.A. This includes the power to require the registration of securities, determine the effectiveness of such registration statements, and punish violations.[14] Further, the Securities Act gives the Commission the power to regulate communications among underwriting participants and their customers prior to distribution, including roadshows, the dissemination of prospectuses, the process of book-building and solicitations of "indications of interest."[15] Finally, Section 28 of the

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[14] *See* 15 U.S.C. § 77e (prohibitions relating to interstate commerce and the mails); 15 U.S.C. § 77f (registration of securities); 15 U.S.C. § 77g (information required in registration statement); 15 U.S.C. § 77h (taking effect of registration statements and amendments thereto); 15 U.S.C. § 77k (civil liabilities on account of false registration statement); 15 U.S.C. § 77aa (schedule of information to be included in a registration statement, including "(16) the price at which it is proposed that the security shall be offered to the public . . . and any variation therefrom . . . [and] (17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered.").

[15] *See supra* Section IV.A; *see also* 15 U.S.C. § 77b(a)(3) (excluding from offering restrictions communications including "preliminary negotiations or agreements between an issuer . . . and any underwriter or among underwriters who are or are to be in privity of contract with an issuer"); 15 U.S.C. § 77j (information required in a prospectus); 15 U.S.C. § 77l (civil liabilities arising in connection with prospectuses and communications); 15 U.S.C. § 77z-2 (application of safe harbor for forward-looking statements); 17 C.F.R. § 230.134(d) (permitting broker-dealers to (cont'd)

Securities Act permits the SEC "to exempt [by rule or regulation] any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of [the Securities Act.]." 15 U.S.C. § 77*z*-3; *see* also 15 U.S.C. § 77r (conferring authority on the Commission to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions" of the Securities Act).

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"solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate . . . whether he might be interested in the security"); Offers and Sales of Securities by Underwriters and Dealers, Securities Act Release No. 4697, 1964 WL 68261, at *2 (May 28, 1964) (during the period after the filing and before the effective date of the registration statement, a broker-dealer "can orally solicit indications of interest or offers to buy and may discuss the securities with his customers and advise them whether or not in his opinion the securities are desirable or suitable for them"); Publication of Information Prior to or After the Effective Date of a Registration Statement, Securities Act Release No. 3844, 1957 WL 3605, at *2 (Oct. 8, 1957) (publication of information prior to or after effective date of registration statement, including restrictions on communications during waiting period); *see also* 17 C.F.R. § 230.144 (Securities Act Rule 144) governing persons deemed not to be engaged in a distribution and therefore not underwriters); 17 C.F.R. § 230.144A (Securities Act Rule 144A governing private resales of securities to institutions); 17 C.F.R. § 230.176 (Securities Act Rule 176 governing circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under § 11 of the Securities Act); 17 C.F.R. § 230.415 (Securities Act Rule 415 governing delayed or continuous offering and sale of securities); 17 C.F.R. § 230.430A (Securities Act Rule 430A governing the prospectus in a registration statement at the time of effectiveness).

3. The SEC's Power To Regulate Under The Exchange Act

The Exchange Act grants the Commission sweeping authority to define and prohibit manipulative practices in connection with securities offerings.[16] *See Friedman*, 313 F.3d at 802 (the Exchange Act "allows price stabilization practices that the SEC does not prohibit"). For example, Section 9(a) of the Exchange Act outlaws certain forms of manipulative conduct involving exchange-listed securities in the aftermarket, and empowers the Commission to determine whether potentially abusive practices involving those securities should be prohibited, permitted or regulated, including whether certain acts of aftermarket stabilization are permissible:

> It shall be unlawful for any person, directly or indirectly . . . (6) To effect . . . any series of transactions . . . for the purpose of pegging, fixing or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors.

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[16] *See, e.g.*, Anti-Manipulation Rules Concerning Securities Offerings, Exchange Act Release No. 7375, 62 Fed. Reg. 520 (Jan. 3, 1997) ("Congress granted the Commission broad rulemaking authority to combat manipulative abuses in whatever form they might take."); Review of Antimanipulation Reg. Of Sec. Offerings, 56 S.E.C. Dkt. 1302 (Apr. 19, 1994) ("Because Congress recognized that market manipulations can assume many forms, it did not define the term in the Exchange Act or elsewhere," but instead provided to the Commission "authority to define manipulative practices and adopt rules to proscribe and prevent such conduct.").

15 U.S.C. § 78i(a) (emphasis added); *see also* 17 C.F.R. § 242.104 (establishing guidelines for stabilization). Whether actions such as the "laddering" or "tie-in" arrangements alleged by the Sherman Act Plaintiffs are permissible aftermarket stabilization practices is not for this Court to determine. It is enough that the Commission is granted the authority to make that determination. *See Stock Exchanges Options*, 317 F.3d at 149 ("The appropriateness of an implied repeal . . . turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.").

Similarly, Section 10(b) of the Exchange Act gives the Commission broad rulemaking authority to address "manipulative and deceptive devices," making it unlawful for any person to employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added). Section 15(c), dealing with the registration and regulation of broker-dealers like the Underwriter Defendants, prohibits broker-dealers from engaging in any transaction "in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice," 15 U.S.C. § 78o(c)(2)(A), and gives the Commission the power "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. 78o(c)(2)(D). The Commission's authority extends to manipulative or deceptive conduct undertaken either unilaterally or in conjunction with other broker-dealers,[17] and it has implemented this arsenal of

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[17] *See, e.g.*, 15 U.S.C. § 78i(a)(6) ("To effect either alone or with one or more other persons any series of transactions . . . ."); 17 C.F.R. § 242.101 (prohibiting manipulative activity undertaken by (cont'd)

authority through the adoption of multifarious rules both defining and addressing manipulative and deceptive conduct.[18]

By far the clearest manifestation of the Commission's power to regulate the landscape of allegedly manipulative and deceptive conduct at issue in this case can be found in 17 C.F.R. § 242.100-05, known as "Regulation M." Regulation M was adopted in 1996 to replace Exchange Act Rules 10b-6, 6A, 7, 8 and 21 (the "trading practice rules"). *See* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Jan. 3, 1997). Regulation M, like the trading practice rules that preceded it,

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a distribution participant either alone or with one or more purchasers).

[18] *See, e.g.*, 17 C.F.R. § 240.10b-3 (prohibiting broker-dealers from employing "in connection with the purchase or sale of any security . . . any act, practice, or course of business defined by the Commission to be included within the term 'manipulative, deceptive, or other fraudulent device or contrivance'"); 17 C.F.R. § 240.10b-5 (prohibiting any person from employing manipulative and deceptive devices "in connection with the purchase or sale of any security"); 17 C.F.R. § 240.10b-18 (providing issuers with a safe harbor from liability for manipulation if they repurchase their common stock in the open market in accordance with the rule's manner, time, price, and volume conditions); 17 C.F.R. § 240.15c1-3 (defining broker-dealer misrepresentations concerning registration of securities as "manipulative and deceptive"); 17 C.F.R. § 240.15c1-5 (defining acts by any broker-dealer "controlled by, controlling, or under common control with, the issuer of any security" as "manipulative and deceptive" absent proper disclosure); 17 C.F.R. § 240.15c1-6 (defining participation by broker-dealer's customers in any distribution in which broker-dealer is participating as manipulative or deceptive absent proper disclosure).

is "intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the 'true' state of the public market for the security being distributed."[19] (SEC Amicus Br. at 11.)

Specifically, Regulation M prohibits distribution participants—including issuers, selling security holders and underwriters—from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the restricted period. 17 C.F.R. § 242.101. Importantly, Regulation M exempts certain conduct that would otherwise be prohibited, such as "transactions among distribution participants in connection with a distribution, . . . purchases of securities from an issuer or selling security holder in connection with a distribution" and "offers to sell or the solicitation of offers to buy the securities being distributed." 17 C.F.R. § 240.101(b)(8)-(9). In addition, Regulation M governs aftermarket stabilization, prohibiting it except "for the purpose of preventing or retarding a decline in the market price of a security," as well as syndicate covering transactions, the imposition of penalty bids and other related activities.[20] 17 C.F.R. § 242.104; *see also*

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[19] *See also* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Jan. 3, 1997) ("Regulation M is intended to preclude manipulative conduct by persons with an interest in the outcome of an offering."); SEC Division of Market Regulation, Staff Legal Bulletin No. 10: Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases, ¶ 2 (August 25, 2000) ("Bulletin No. 10"), available at http://www.sec.gov/interps/legal/slbmr10.htm ("Regulation M is intended to protect the integrity of the offering process by precluding activities that could artificially influence the market for the offered security.").

[20] A syndicate covering transaction is "the placing of any bid or the effecting of any purchase on behalf of the sole distributor or (cont'd)

Papilsky Release, 1980 WL 22136, at *4 ("In connection with some fixed price offerings, the underwriters may elect to 'stabilize' the market for the offered security during the distribution. . . . Stabilization is intended to facilitate an orderly distribution of securities by preventing or retarding a marked decline in the price of the offered security."); *cf.* 17 C.F.R. § 240.17a-2 (Exchange Act rule setting forth certain record-keeping requirements related to stabilization, syndicate covering transactions and penalty bids).

Included in the Commission's interpretation of prohibited activity under Regulation M are the very tie-in, laddering and other aftermarket agreements alleged by the Sherman Act Plaintiffs. On August 25, 2000, the SEC's Division of Market Regulation released Bulletin No. 10, titled "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," in order to "remind[] underwriters, broker-dealers, and any other person who is participating in a distribution of securities . . . that they are prohibited from soliciting or requiring their customers to make aftermarket purchases until the distribution is completed." Bulletin No. 10, Summary. Specifically, Bulletin No. 10 addresses "complaints that, while participating in a distribution of securities, underwriters and broker-dealers have solicited their customers to make additional purchases of the offered security after trading in the security begins," and that "some

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the underwriting syndicate or group to reduce a short position created in connection with the offering." 17 C.F.R. § 242.100(b). A penalty bid is "an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions." 17 C.F.R. § 242.100(b). Both are techniques used to stabilize IPO prices in the aftermarket.

underwriters have required their customers to agree to buy additional shares in the aftermarket as a condition to being allocated shares in the distribution (i.e., 'tie-in' agreements)." Bulletin No. 10 ¶ 1. Reiterating the Commission's consistent view of this conduct, Bulletin No. 10 explained:

> Tie-in agreements are a particularly egregious form of solicited transaction prohibited by Regulation M. As far back as 1961, the Commission addressed reports that certain dealers participating in distributions of new issues had been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue was initially sold. The Commission said that such agreements may violate the anti-manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

Bulletin No. 10 ¶ 2 (footnotes omitted).

Finally, in an analogue to its broad exemptive powers under the Securities Act, Section 36 of the Exchange Act grants the SEC general exemptive power pursuant to which "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder." 15 U.S.C. § 78mm.

4. The SEC's Pervasive Authority Over SROs

As noted earlier, the SEC is empowered to regulate or oversee the regulation of the spectrum of broker-dealer conduct through its pervasive regulation of the NASD and other SROs. *See supra* Section IV.A; *see also* NASD Manual, Rule 2210: Communications With The Public (setting out standards and filing requirements for members'

communications with the public); NASD Manual, Rule 2711: Research Analysts and Research Reports (rule governing research analyst reports); NASD Manual, Rule 2720: Distribution of Securities of Members and Affiliates — Conflicts of Interest (prohibiting members and associated persons from participating in the distribution of a public offering if there is a conflict of interest with the issuer); NASD Manual, Rule 2750: Transactions With Related Persons (prohibiting the selling or placement of securities by an NASD member engaged in a fixed price offering to certain related persons unless certain conditions are met).

5. The SEC's Power To Regulate Underwriter Compensation And Commission Practices

Finally, the Commission, along with the NASD and other SROs, engages in active regulation of underwriter compensation and commission practices. *Gordon,* 422 U.S. at 659 (holding that systems of fixed commission rates, which are under the active supervision of the SEC, are immune from antitrust laws). Apart from its authority over SROs, the Commission itself directly regulates underwriter commissions and compensation. For example, Section 6(e)(1) of the Exchange Act authorizes the Commission to permit a "national securities exchange to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts or other fees to be charged by its members for effecting transactions on such exchange." 15 U.S.C. § 78f.[21]

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[21] *See also* 15 U.S.C. § 78o-3(b) ("An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that . . . (6) the rules of the association . . . are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members.").

In addition, Exchange Act Rule 10b-10 requires broker-dealers to disclose, inter alia, brokerage commissions in written trade confirmations required to be sent to customers. 17 C.F.R. § 240.10b-10(a)(2)(i)(B).[22] Further, in order to accelerate the effective date of a registration statement, a registrant must notify the Commission whether the NASD has reviewed the proposed underwriting compensation and "issued a statement expressing no objections to the compensation and other arrangements," and the Commission may deny acceleration if the NASD has not issued such a statement. 17 C.F.R. §§ 230.461(a) & (b)(6). Finally, Regulation S-K, Section 508(3) requires that a registration statement "sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter." 17 C.F.R. § 229.508(e).[23]

For its part, the NASD extensively regulates underwriter compensation and commission practices. For example, the NASD's corporate financing rule: (1) defines what constitutes underwriter compensation; (2) sets limits on the

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[22] *See also* 15 U.S.C. § 78bb(e) (rejecting liability for broker-dealer "solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction").

[23] Further, the Commission's Division of Enforcement regularly enforces violations of NASD rules concerning underwriter compensation and commissions. *See, e.g., In re A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 44328, 75 S.E.C. Dkt. 53 (May 21, 2001); *In re Shamrock Partners, Ltd.*, Exchange Act Release No. 40663, 68 S.E.C. Dkt. 1382 (Nov. 12, 1998); *In re William Jackson Blaylock*, Exchange Act Release No. 35002, 58 S.E.C. Dkt. 147 (Nov. 23, 1994), pet. denied, 96 F.3d 1457 (11th Cir. 1996) (table).

amount of compensation that underwriters may receive from issuers and their affiliates; and (3) requires submission of proposed underwriting terms and arrangements for every interstate public offering to the NASD for review and approval prior to distribution. NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements. In addition, NASD Rule 2440, and its accompanying interpretation IM-2440, directly address the fairness and disclosure of commissions charged to a brokerdealer's customers, and provide a non-exclusive list of "relevant factors" that must be considered.

In arguing against the application of implied immunity in this case, the Sherman Act Plaintiffs rely on *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 00 Civ. 7804 (LMM), 2003 WL 21496795, at *1 (S.D.N.Y. June 27, 2003) ("*Public Offering Fee*"), a case dealing with underwriter compensation. In *Public Offering Fee*, District Judge Lawrence M. McKenna declined to confer implied immunity where the plaintiffs alleged that certain underwriters, including some of the Underwriter Defendants in this action, colluded to fix the underwriting fees charged to issuers at seven percent of the proceeds of IPOs valued between $ 20 million and $ 80 million. 2003 WL 21496795, at *1. The court rejected the defendants' contention that "implied repeal is appropriate . . . because plaintiffs' claims and any adjudication of these claims . . . would conflict with the 'long-standing, active and pervasive regulation' by the SEC and the NASD of underwriting compensation in public offerings." *Public Offering Fee*, 2003 WL 21496795, at *2. *Public Offering Fee*, however, is distinguishable from this case.

First, the *Public Offering Fee* plaintiffs alleged that the underwriters colluded to fix commissions at a certain percentage, and the court concluded that the defendants "had not provided any statutory or regulatory authority, legislative history or past regulatory activity that even hint that the SEC

or the NASD permit, have permitted or have the authority to permit the fixing of underwriters' IPO fees." 2003 WL 21496795, at *2. Thus, the allegations in *Public Offering Fee* were of a prototypal horizontal price-fixing conspiracy, a narrow issue that is the very evil the Sherman Act was enacted to combat.[24] In contrast, much of the broad-based conduct alleged by the Sherman Act Plaintiffs in this action is permitted under the current securities regulatory regime, *see supra* Section IV.A, while the balance of the allegations are within the scope of the SEC's expansive authority, *see supra* Sections IV.B.1-4, and outside the heartland of Sherman Act prohibitions.

Further, as discussed above, multiple NASD rules define and limit underwriter compensation, and provide a method to determine whether any such compensation is "fair." *See* NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements; NASD Manual, Rule 2440: Fair Prices and Commissions; IM-2440: Mark-Up Policy; *cf. Friedman*, 313 F.3d at 799 ("Implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law."). In addition, under the broad exemptive provisions of the Exchange Act, the SEC has the power to permit a national securities association or exchange to fix any commission or fee structure it sees fit, or to permit certain types of discrimination in the imposition of commissions or fees.[25] Consequently, the SEC, and, by extension, the NASD,

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[24] *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the *Sherman Act* was intended to prohibit.") (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 52-60 (1911)).

[25] *Compare* 15 U.S.C. § 78f (SEC may permit a "national securities exchange to impose a reasonable schedule or fix

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may permit the conduct related to commission practices alleged in this case. Accordingly, a nascent conflict between the securities regulatory regime and antitrust laws emerges. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801.

Finally, the Sherman Act Plaintiffs' allegations concerning unfair commission practices are properly characterized as manipulative. As a result, implied immunity is warranted because of the Commission's pervasive authority to regulate, and active regulation of, manipulative and deceptive practices under the Exchange Act and related rules. *See supra* Section IV.B.3; *see also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 383 (S.D.N.Y. 2003) (finding a properly-pled 10b-5(b) claim based, inter alia, on a failure to disclose "compensation—in the form of money or commissions" under NASD Rule 2710). The Sherman Act Plaintiffs concede this point. (Pl. Opp. at 26 ("The unambiguous language of the statue and regulations makes clear that Defendants-conspirators allegedly engaged in conduct which violated securities laws on disclosure of

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reasonable rates of commissions, allowances, discounts or other fees to be charged by its members for effecting transactions on such exchange") and 15 U.S.C. § 78o-3(b) (a national securities association may not be registered with the SEC absent a determination by the SEC that its rules "are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members") *with* 15 U.S.C. § 78mm ("The Commission . . . may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder.").

underwriter compensation.").) Therefore, *Public Offering Fee* does not rescue the Sherman Act Plaintiffs' claims.

C. The SEC's Consideration Of The Conduct At Issue

In *Friedman*, the Second Circuit pointed to the fact that the SEC had repeatedly acknowledged its awareness of the conduct alleged by the plaintiffs, and exercised its regulatory authority over such conduct even though it had never elected to prohibit it, as well as the fact that the Exchange Act "allows price stabilization practices that the SEC does not prohibit," in reaching its determination that implied immunity was required. *Friedman*, 313 F.3d at 802. Similarly, the Second Circuit in *Stock Exchanges Options* noted that the SEC had vacillated between allowing and prohibiting multiple options listing on a number of occasions. *See Stock Exchanges Options*, 317 F.3d at 139-142. Plaintiffs, as well as the DOJ and the NYAG, attempt to distinguish this action from *Friedman* and *Stock Exchanges Options* on these facts, arguing that no such active regulation, or affirmative decision not to regulate, exists with respect to the panoply of conduct alleged in the Sherman Act Complaint. That argument, however, overlooks the Commission's well-documented history of considering the very conduct alleged in this action, and its current activity aimed at formulating responses to the alleged "hot issue" abuses of the late 1990s.

1. The SEC's Prior Consideration Of The Conduct Alleged In The Sherman Act Complaint

In 1974, the Commission proposed, but did not adopt, Proposed Rule 10b-20.[26] *See* Bulletin No. 10 ¶ 2 n.6. The

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[26] Among other things, Rule 10b-20 would have regulated how underwriters allocate securities of new issues, and banned "tie-in (cont'd)

proposed rule would have prohibited broker-dealers, issuers and other distribution participants from: (1) requiring a prospective or actual purchaser of an offering to purchase any other security being offered or sold by any of the entities; (2) in the case of a registered distribution of securities, requiring a prospective or actual purchaser of an offering to pay any consideration other than that indicated in the applicable prospectus; and (3) requiring any other act, conduct, transaction or promise of any purchaser of any security offered for sale by such entities, with certain limited exceptions. Exchange Act Release No. 10636, 39 Fed. Reg. at 7806-07. As the Commission explained in Bulletin No. 10:

> Among other things, [Proposed Rule 10b-20] would have explicitly prohibited broker-dealers (and others) from (explicitly or implicitly) demanding from their customers any payment or consideration (including a requirement to purchase other securities) in addition to the announced offering price of the offered security. This would include, for example, conditioning an allocation of shares in a "hot issue" (for which demand exceeds supply) on an agreement to buy shares in another offering or in the aftermarket of another offering, for which there may be a lack of demand.

Bulletin No. 10 ¶ 2 n.6.

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agreements" in connection with such offerings. *See* Notice of Proposed Rules 10b-20 and 10b-21 and Amendments to Rule 17a-3(a)(6) and 17a-3(a)(7) under the Securities Exchange Act of 1934, Exchange Act Release No. 10636, 39 Fed. Reg. 7806 (Feb. 11, 1974); Exchange Act Release No. 11328, 40 Fed. Reg. 16090 (April 2, 1975). In its proposing release, the Commission noted that one of the rationales for proposed Rule 10b-20 was that some broker-dealers were "imposing requirements involving consideration in addition to the announced price of the shares." 39 Fed. Reg. at 7806.

Proposed Rule 10b-20 was subject to comment for fourteen years. Bulletin No. 10 ¶ 2 n.6. In 1988, it was withdrawn because, inter alia, the SEC "concluded that such agreements [as would have been prohibited under the proposed rule] may be reached under the existing anti-fraud and anti-manipulation provisions of the federal securities laws." Bulletin No. 10 ¶ 2 n.6. In withdrawing proposed Rule 10b-20, the Commission noted that:

> The proposed rule would prohibit broker-dealers and others from explicitly or implicitly demanding from their customers any payment or consideration in addition to the announced offering price of any securities. The proposal was intended to prohibit the practice whereby underwriters induced persons to purchase 'sticky' issues with the opportunity to purchase more attractive 'hot' issues . . . . In view of the substantial period of time that has elapsed since Rule 10b-20 was proposed and the fact that 'tie-in' arrangements may be reached under existing antifraud and anti-manipulation provisions of the federal securities laws, the Commission has determined to withdraw proposed Rule 10b-20.

Withdrawal of Proposed Rules Under the Securities Exchange Act of 1934, Exchange Act Release No. 26182, 53 Fed. Reg. 41,206 (Oct. 20, 1988). Thus, for fourteen years the SEC considered, but eventually rejected, imposing bright-line rules concerning "tie-in" arrangements and other improper aftermarket practices alleged in the Sherman Act Complaint, favoring instead a flexible regulatory approach under its general anti-fraud provisions, now embodied in Regulation M.

In another example of the Commission's past consideration of the conduct at issue in this case, the SEC released the "Report Of The Securities And Exchange Commission Concerning The Hot Issues Markets" in August 1984 (the "Hot Issues Report"). In the Hot Issues Report, the SEC recognized that "generally, the abuses found in a hot

issues market involve either artificial restrictions on supply or attempts to stimulate demand that facilitate a rapid rise in the price of the security." (Hot Issues Report at 29.) The Hot Issues Report recognized, however, that some artificial restrictions on supply and efforts to enhance demand are permissible under certain circumstances. (Hot Issues Report at 29 (noting that it is "important to distinguish the illegal abuse of legitimate practices from legal practices so as to not preclude legitimate actions").)

In the Hot Issues Report, the Commission noted that certain "tie-in arrangements" may violate Sections 9 and 10(b) of the Exchange Act, 15 U.S.C. § 78i & 78j(b), as well as Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, because they "stimulate[] demand for a hot issue in the aftermarket, thereby facilitating the process by which stock prices rise to a premium." (Hot Issues Report at 37-38.) However, the SEC noted that the improper conduct at issue in this case is recurrent in every "hot issue" cycle, and is adequately addressed by existing securities laws without the need to impose unnecessarily rigid limitations antithetical to the Commission's stated goals:

> Existing statutory authority provides the Commission with the necessary flexibility to adopt rules that address hot issues abuses . . . . All of the abuses described in this Report are prohibited by the existing federal securities laws, and the Commission periodically reviews its regulations to assure that they are current. . . . The Commission has maintained vigilant oversight over the hot issues markets and has effectively utilized its adequate statutory and rulemaking authority to reach abuses. The Commission has aggressively ferreted out fraudulent conduct and preserved the integrity of the markets while avoiding unnecessary restrictions on first-time issuers that may stifle creativity, deny essential financing to legitimate businesses, and deter legitimate conduct.

(Hot Issues Report at 76-77, 81-82 (emphasis added).)

Further, when it proposed Regulation M to replace the trading practice rules, the SEC announced that it intended to gather information about aftermarket activities so that it could evaluate whether any additional regulation was necessary. For example, in their proposing release dated April 18, 1996, the Commission recognized the necessity of some aftermarket manipulation by syndicate participants, and once again eschewed bright-line rules prohibiting all aftermarket manipulation in favor of a flexible approach:

> An underwriter's interest in the success of an offering does not necessarily end with the completion of the sales efforts and termination of formal stabilizing activities, but can extend into the "aftermarket" trading in the distributed security (in general, the period immediately following the termination of formal syndicate activity—the so-called "breaking of the syndicate"). Aftermarket participation may be an expected part of the underwriting services provided to an issuer, and the anticipated quality of such services can influence the issuer's selection of a managing underwriter. Underwriters also have an incentive to provide "support" in the aftermarket to counterbalance pressure on the security's price from "flipping" and other selling activity that could adversely affect the investors who have purchased in the offering. In addition, the managing underwriter often purchases shares in the aftermarket period to cover a syndicate short position. Accordingly, the point in time when underwriters no longer have the purpose to "facilitate an offering" cannot be identified with precision.

SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996) (footnote omitted); *see also* SEC Release No. 33-7375, 62 Fed. Reg. 520, 537-38 (Jan. 3, 1997) ("Syndicate short covering transactions and the imposition of penalty bids by underwriters are activities that can facilitate an offering in a manner similar to stabilization . . . the Commission proposed, and has determined to adopt, the provisions

relating to disclosure, notification, and recordkeeping of syndicate covering transactions and the imposition of penalty bids.").

2. The SEC's Current Consideration of The Conduct At Issue

In its amicus submission, the SEC asserts that it not only considered "tie-in" arrangements and other aftermarket price activity in the past, but in fact is investigating the conduct at issue in this case for potential violations of existing statutes, regulations and rules concerning the price setting process and allocation practices of "hot issue" underwriters. (SEC Amicus Br. at 14 ("The Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.").)

This ongoing review is embodied in a number of recent Commission and SRO activities. For example, the Commission requested that the NYSE and NASD appoint a "high-level group of business and academic leaders" to investigate whether additional rulemaking was required concerning "IPO allocation practices and the roles of issuers and underwriters in the price setting and offering process." *See* SEC Press Release No. 2002-127 (Aug. 22, 2002), "Chairman Pitt Seeks Review Of Initial Public Offering Process," available at http://www.sec.gov/news/press/2002-127.htm. In addition, in the Final Report of the 2003 Conference on Federal-State Securities Regulation (the "2003 Report"), the Market Regulation working group report noted that "the initial public offering underwriting process has come under a lot of scrutiny lately especially with regard to perceived abuses in the pricing and allocation of IPO shares." Final Report of the 2003 Conference on Federal-State Securities Regulation, II.C.5 (June 2003), available at http://www.sec.gov/info/smallbus/ffedst2003.htm. The 2003

Report notes that "Commission staff reported that it is currently reviewing industry practices regarding the roles of issuers and underwriters in the price setting and the allocation of IPO shares as well as the offering process in general." 2003 Report at C.5.[27]

The NASD is also actively reviewing the conduct at issue in this case in an attempt to determine what, if any, regulatory steps need to be taken. First, the NASD proposed, and the SEC is currently reviewing, Proposed Rule 2790 to replace NASD IM-2110-1, the Free Riding and Withholding Interpretation. SEC Release No. 34-46942 (Dec. 4, 2002). Proposed Rule 2790, titled "Trading in Hot Equity Offerings," was proposed to "focus and streamline [IM-2110-1], as well as to address feedback received in response to our request for comment on NASD rules in need of modernization in Notice to Members 98-81." SEC Release No. 34-46942, at II.A.1. The stated purpose of Proposed Rule 2790, like IM-2110-1, is to "to protect the integrity of the public offering process" by requiring all participants in an offering syndicate to make bona fide public distributions, not to withhold securities for their own benefit, and not to use allocation of securities to reward persons for future business. SEC Release No. 34-46942, at II.A.1.

In addition, the NASD sought comment from its members on whether "to create new Rule 2712 and amend existing Rule 2710 to prohibit certain IPO allocation abuses."

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[27] *See also The Impact of the Global Settlement: Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 108th Cong. 20, at Section V.B (2003) (testimony of Hon. William H. Donaldson, Chairman, SEC) ("Donaldson Testimony") ("In the months ahead, the Commission will continue to examine the IPO practices of the industry to determine whether further Commission or SRO action is necessary, including the possibility of revising existing rules or proposing new rulemaking.").

See NASD Notice to Members No. 02-55: "Regulation of IPO Allocations and Distributions" (August 2002), available at http://www.nasdr.com/pdf-text/0255ntm.pdf. The proposal would largely prohibit the conduct alleged by the Sherman Act Plaintiffs in this action, including:

> the allocation of IPO shares as consideration or inducement for the payment of excessive compensation for other services provided by the member; the solicitation of aftermarket orders for the allocation of IPO shares; the allocation of IPO shares to an executive officer or director of a company on the condition that the officer or director send the company's investment banking business to the member, or as consideration for investment banking services previously rendered; and the imposition of a penalty on registered representatives whose retail customers have "flipped" IPO shares when similar penalties have not been imposed with respect to syndicate members.

NASD Notice No. 02-55. The NASD recognizes that the conduct addressed in this Proposed Rule is already largely prohibited by current SEC and NASD regulation, but is soliciting comment on the theory that the "new, specifically targeted provisions in Rule 2712 would aid member compliance efforts and help to maintain investor confidence in the capital markets." NASD Notice No. 0255; *see also* Donaldson Testimony at Section V.B ("The NASD recently sought comment from its members on its proposed new rules regarding the regulation of IPO allocations and distributions. These rules are intended to better ensure that members avoid unacceptable conduct when they engage in the allocation and distribution of IPOs.").

3. Enforcement Actions Based On The Conduct At Issue

In addition to considering new rules aimed at the conduct at issue in this case, the SEC's Division of Enforcement has

brought injunctive actions alleging underwriter violations of current federal securities laws and NASD rules by broker-dealers engaging in conduct very similar, if not identical, to that alleged in the Sherman Act complaint.[28] Such active regulation of the conduct alleged in the Sherman Act Complaint militates strongly in favor of a finding of

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[28] For example, in *SEC v. J.P. Morgan Securities Inc.*, No. 03 Civ. 02028 (D.D.C.), defendant J.P. Morgan Securities, Inc. ("JP Morgan") consented to entry of a final judgment permanently enjoining it from violating Rule 101 of Regulation M and NASD Rule 2110, and ordering it to pay a $25 million civil penalty, for conduct relating to IPO allocations it underwrote during 1999 and 2000. The Commission's complaint alleges that JP Morgan violated Rule 101 of Regulation M by, inter alia, attempting to induce certain customers to make aftermarket purchases during the restricted period through much of the same conduct alleged in the Sherman Act Complaint.

Similarly, in *SEC v. Robertson Stephens, Inc.*, No. 03 Civ. 0027 (D.D.C.), the Commission filed a civil action against broker-dealer Robertson Stephens, Inc. "relating to the firm's allocation of shares in Initial Public Offerings (IPOs) during 1999 and 2000." In its complaint, the Commission alleged that Robertson Stephens "wrongfully obtained millions of dollars from over 100 customers by allocating shares of 'hot' IPOs to these customers and receiving, in return, profits—in the form of excessive commissions or markdowns—made by these customers on their IPO stock."

In addition, in *SEC v. Credit Suisse First Boston Corp.*, 2002 WL 479836 (D.D.C. Jan. 29, 2002), the district court approved and entered a consent judgment permanently enjoining defendant Credit Suisse First Boston Corp. ("CSFB") from violating certain NASD rules and SEC regulations. The SEC's complaint alleged that CSFB extracted "excessive commissions" from its customers through certain "pay to play" arrangements in which CSFB required its customers to share profits made by flipping IPO shares.

immunity under a *Gordon* analysis. *See Stock Exchanges Options*, 317 F.3d at 147.

D. Implied Immunity And The Sherman Act Plaintiffs' Claims

In *Friedman* and *Stock Exchange Options*, the Second Circuit clarified that the mere potential for conflict, determined by examining the scope of the SEC's regulatory power over the alleged behavior, satisfies the implied immunity doctrine's "plain repugnancy" requirement and mandates that immunity be granted. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801. In this case, it is clear that the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct such that a failure to find implied immunity would "conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit." *Stock Exchanges Options*, 317 F.3d at 149.

In its amicus submission, the NYAG acknowledges that "the Second Circuit's [*Stock Exchanges Options*] decision might be read to suggest that implied immunity may be found whenever there is a potential conflict with a regulatory scheme, whether or not that potential materializes into actual conflict." (NYAG Amicus Br. at 10-11.) Nevertheless, the NYAG urges this Court to reject that holding as "unsound as a matter of policy."[29] (NYAG Amicus Br. at 11.) Since implied immunity in this action does not maroon the Sherman Act Plaintiffs, this Court does not share the NYAG's policy concern. The Sherman Act Plaintiffs'

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[29] The Sherman Act Plaintiffs do not address the broader implications of the Second Circuit's language in *Stock Exchanges Options*.

securities fraud claims survived a motion to dismiss in the parallel action, and this Court makes no judgment as to the relative merit of those claims. *See Initial Pub. Offering Sec. Lit.*, 241 F. Supp. 2d at 399.

Undoubtedly, the SEC, the NASD, and other SROs will continue to study the conduct alleged, and enact changes to the current securities regulatory regime that are appropriate in consideration of the Commission's mandate to "balance the benefits of competition against its other regulatory aims." *In re Stock Exch. Options Trading Antitrust Litig.*, 2001 WL 128325, at *10 (S.D.N.Y. Feb 15, 2001), aff'd, 317 F.3d 134 (2d Cir. 2003). Accordingly, the conduct alleged by the Sherman Act Plaintiffs is immune from the application of antitrust laws, and the Underwriter Defendants' motion to dismiss the Sherman Act Complaint's federal antitrust claims is granted.

E. State Antitrust Claims

While Supreme Court and Second Circuit precedent do not address the doctrine of implied immunity as it relates to state antitrust laws, reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antritrust scrutiny. Any other outcome would eviscerate the implied immunity doctrine. To shield the securities regulatory regime from encroachment by the Sherman Act, only to expose that regime to assault by a swarm of state antitrust claims, would shatter the federal regulatory framework for national securities markets. *Cf. Stock Exchanges Options*, 2001 WL 128325, at *11 ("bifurcating antitrust immunity according to the status of the defendant undoubtably would undermine this Court's holding . . . . If this were so, the application of antitrust immunity would be rendered nugatory."). This Court will not countenance such a mischievous result. Accordingly, the Sherman Act Plaintiffs' state antitrust claims are also dismissed under the doctrine of

implied immunity. As a result, the Underwriter Defendants' motion to dismiss the Sherman Act Complaint is granted.

V. The Robinson-Patman Act Complaint

The Robinson-Patman Act Complaint, charging a violation of Section 2(c) of the Robinson-Patman Act, alleges nearly all of the same conduct described by the *Sherman Act* Plaintiffs in their complaint, but adds allegations of conduct by defendants that discouraged "flipping." (Robinson-Patman Act Compl. ¶¶ 64-71, 74-89.) In *Friedman*, the Second Circuit held that implied immunity from antitrust regulation was proper for broker-dealer conduct discouraging "flipping" of IPO shares because "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." 313 F.3d at 801. This Court agrees with the Second Circuit's determination in *Friedman* that practices designed to combat "flipping" are immune from antitrust scrutiny. For this reason, and those set forth earlier in this Memorandum and Order concerning the conduct alleged in the Sherman Act Complaint, this Court holds that implied immunity is warranted with respect to the Robinson-Patman Act Plaintiffs' claims. Accordingly, the Underwriter Defendants' motion to dismiss the Robinson-Patman Act Complaint is granted.

CONCLUSION

For the reasons set forth above, the Underwriter Defendants' motion to dismiss this action on the grounds of implied immunity is granted, and both the Sherman Act Complaint and the Robinson-Patman Act Complaint are dismissed with prejudice as against all defendants. The Clerk of Court is directed to mark this case closed.

Dated: November 3, 2003

New York, New York

SO ORDERED:

/s/ William H. Pauley III

U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Glen Billing, individually and on behalf of all those similarly situated, et al.,

Plaintiffs-Appellants,

v.

Credit Suisse First Boston Ltd., et al.,

Defendants-Appellees.

Date:	1/11/06
Docket Number:	03-9284-cv
Short Title:	Billing v. Credit Suisse First
DC Docket Number:	01-cv-2014
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable William Pauley

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 12th day of January two thousand six.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee Credit Suisse First Boston. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ _____
Motion Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION	:	Case No. 01 CIV 2014 (WHP)

MEMORANDUM *AMICUS CURIAE* OF THE SECURITIES AND EXCHANGE COMMISSION, SUBMITTED AT THE REQUEST OF THE COURT

Of Counsel
MEYER EISENBERG
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. The Commission has pervasive regulatory authority over the syndicated offering process, including determining the appropriate balance of competition with other public interest and investment protection considerations, and it is actively exercising that authority 4

A. Congress has directed the Commission, not private antitrust plaintiffs, to determine the appropriate role for competition in the securities industry 4

B. The Commission has comprehensive authority to regulate the syndicate offering process directly, as well as to oversee the securities self-regulatory organizations that are statutorily required to provide additional regulation 7

1. Commission regulation of the securities offering process 8

2. Commission authority to regulate or prohibit manipulative conduct 9

3. Commission oversight responsibility for the NASD 12

B. The Commission is actively pursuing possible regulatory responses to the types of practices alleged by plaintiffs 13

II. Immunity is necessary in order to permit the regulatory regime to function as envisioned by Congress 17

TABLE OF CONTENTS (CONTINUED)

Page

III. Plaintiffs seek to displace the Commission's regulatory authority by basing their antitrust case largely on inferences they wish to draw from certain conduct that is permitted by the Commission, and by giving an antitrust court the responsibility for interpreting and applying the securities laws 32

A. Plaintiffs seek to prove an antitrust case based on inferences of illegal conduct drawn from the fact that defendants engaged in certain lawful, regulated conduct 33

B. Assuming Plaintiffs Have Adequately Alleged Conduct That Violates the Securities Laws, Immunity is Necessary to Permit the Commission to Carry Out its Regulatory Functions, and to Prevent Interference with the Commission Approved and Regulated Syndicated Underwriting Process 36

CONCLUSION 40

CERTIFICATE OF SERVICE

ATTACHMENT: SEC Press Release No. 2002-127 (Aug. 22, 2002)

TABLE OF AUTHORITIES

[table omitted in printing]

INTRODUCTION

Plaintiffs in these consolidated cases claim, in essence, that defendants have engaged in misconduct in the course of selling securities, yet they seek to pursue their claims under the antitrust laws, thus avoiding the pleading and other requirements for stating a private right of action for violation of the securities laws. The Court has requested the Securities and Exchange Commission to advise the Court of its views as to whether "the IPO allocation and commission practices challenged" in these consolidated antitrust cases "are comprehensively regulated under the securities laws, and thus impliedly immune from scrutiny under the antitrust laws." Order of August 8, 2002. For the reasons discussed below, the Commission answers yes to the issue raised by the Court. Moreover, implied immunity is necessary in the context of syndicated securities offerings in order to make the regulatory scheme expressed by Congress in the securities laws work.

The IPO allocation and commission practices challenged fall within the very heart of the Commission's regulatory authority over underwriting syndicates under both the Securities Act of 1933, 15 U.S.C. 77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, and they are comprehensively regulated. Indeed, much of the joint conduct among syndicate members that is alleged by plaintiffs is conduct that is necessary to the offering process, and that is permitted under the Commission's rules. To the extent that plaintiffs allege conduct that may violate current law, or that threatens harm to investors or to the markets, the Commission is well aware of the issues that have been raised in this area, including the types of practices alleged by plaintiffs. It is actively pursuing comprehensive regulatory

responses to those concerns, including possible enforcement actions and rulemaking.[1]

In particular, the Commission has announced that it is pursuing enforcement investigations to determine whether underwriters have complied with the existing statutes, rules and rules concerning IPOs; securities self-regulatory organizations that it oversees are considering whether to adopt additional rules; and the Commission's Chairman has requested the New York Stock Exchange and National Association of Securities Dealers to jointly convene a Blue Ribbon panel to review the IPO process in order to determine whether additional rulemaking is required to strengthen the integrity of the offering process and to better protect investors.

Permitting the possibility of antitrust liability for conduct that is under comprehensive scrutiny by the agency charged with determining what conduct is permissible and what is not would disrupt the Commission's regulatory regime, as established by Congress, including particularly its ongoing

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[1] The parties have treated the complaint in *In re Initial Public Offering Antitrust Litigation* as the lead pleading, and we will follow that course as well. Plaintiffs in *Pfeiffer v. Credit Suisse First Boston Corp.* allege similar misconduct, though they rest their case on the commercial bribery provisions of the Robinson-Patman Act, 15 U.S.C. 13(c), rather than on Section 1 of the Sherman Act. Despite the differences between the theories under which the two cases are brought, in the Commission's view the fundamental point so far as antitrust immunity concerned is the same—all the plaintiffs challenge "allocation and commission practices" that are subject to comprehensive Commission regulation, and their attempts to remedy those claims through the antitrust laws threaten to disrupt the Commission's regulatory regime, as well as the economic conduct that is the subject of that regulation.

regulatory efforts. It could also interfere with the capital raising activities that are the subject of that regulation. Therefore, the Court should not permit the case to go forward, but should instead hold that the antitrust laws are repealed with respect to defendants' conduct as alleged in this case.[2]

I. The Commission has pervasive regulatory authority over the syndicated offering process, including determining the appropriate balance of competition with other public interest and investment protection considerations, and it is actively exercising that authority.

A. Congress has directed the Commission, not private antitrust plaintiffs, to determine the appropriate role for competition in the securities industry.

Congress requires the Commission in carrying out its regulatory responsibilities to consider competitive concerns as part if its consideration of relevant factors. Thus, both the Securities Act and the Exchange Act direct that whenever the

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[2] The Commission expresses no opinion about whether any of the defendants engaged in conduct like that alleged in the complaint, including market manipulation, laddering, unlawful tie-in agreements, and profit sharing. There is no doubt, of course, that conduct by underwriters may violate the securities laws. In its ongoing investigations, the Commission is in the process of ascertaining whether violations of the federal securities laws actually occurred, but those ultimate determinations are not dispositive of the antitrust immunity issue raised in this case. Rather, the basis for immunity here is that applying a different standard than that to be applied by the Commission could impair its ability to carry out its regulatory obligations. Therefore, this brief addresses solely whether there should be antitrust immunity, assuming that plaintiffs have pleaded, and are ultimately able to prove, the alleged misconduct in connection with IPO allocations.

Commission is engaged in rulemaking "and is required to consider or determine whether an action is necessary or appropriate in the public interest," it shall consider "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." Section 2(b) of the Securities Act, 15 U.S.C. 77b(b); Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

Similarly, Section 23(a)(2) of the Exchange Act, 15 U.S.C. 78w(a)(2), provides that "in making rules and regulations pursuant to any provisions of this title" the Commission "shall consider among other matters the impact any such rule or regulation would have on competition." And in deciding whether to permit the registration of a national securities association (like NASD), the Commission must determine that the association's rules are designed, among other objectives, "to remove impediments to and perfect the mechanism of a free and open market and a national market system" (Section 15A(b)(6), 15 U.S.C. 78o-3(b)(6)), and that those rules "do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title" (Section 15A(b)(9), 15 U.S.C. 78o-3(b)(9)). The plain language of these provisions establishes that the Commission may adopt a rule or regulation, even one that may adversely affect competition, as long as the proposed rule's burden on competition is "necessary or appropriate in furtherance of the purposes of" the federal securities laws.

Thus, Congress has instructed the Commission to consider competition in all of its regulatory efforts, but it has not made promoting competition *the* paramount consideration. As explained in the legislative history to the statute that added Section 23(a) to the Exchange Act in 1975,

> This explicit obligation to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive

> manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions.

S. Rep. 94-75, at 13, *reprinted in* 1975 U.S.C.C.A.N. 179, 191.[3]

As the Court of Appeals for the District of Columbia Circuit observed in rejecting an assertion that the Commission in rulemaking must always adopt the least anticompetitive alternative, "the tendency in antitrust adjudication to view business relationships in the black and white terms of legality or illegality, based solely on their

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[3] In contrast, the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, the statute at issue in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), requires the Commodity Futures Trading Commission to "take into consideration the public interest to be protected by the antitrust laws and *endeavor to take the least anticompetitive means of achieving the objectives of this Act* as well as the policies and purposes of the" statute when exercising its regulatory authority. 7 U.S.C. 19(b) (emphasis added). The securities laws' emphasis on balancing competition with other concerns also contrasts with the statutory provisions at issue in the Second Circuit's recent decision in *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002). Rather than making competition one factor among others, Congress described the purpose of the 1996 Telecommunications Act at issue in that case as being to "'provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition * * * .'" H.R. Cong. Rep. 104-458, 1996 WL 46795, at *1 (1996)." 305 F.3d at 109. The decision, therefore, brings home the importance of engaging in close analysis of the particular regulatory provisions at issue, rather than formulating broad rules about what sorts of conduct are or are not *always* immune.

competitive or anticompetitive impact, has no place" in evaluating Commission decisions. *Bradford National Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978). In other words, there is no reason "to treat competitive concerns as any more important or any less subject to judicial deference to administrative choices, than any other factor that is relevant to the legality of administrative action." *Id.* Therefore, while enhancing competition "is a factor to be considered" by the Commission, it is up to the Commission to "'balance' those concerns against all others that are relevant under the statute." 590 F.2d at 1104-05.

B. The Commission has comprehensive authority to regulate the syndicate offering process directly, as well as to oversee the securities self-regulatory organizations that are statutorily required to provide additional regulation.

Congress has entrusted the Commission with the responsibility to regulate the system of syndicated underwriting through which defendants are alleged to have implemented their scheme, and the conduct that forms the basis for the complaint. This authority stems from three separate congressional grants of authority: (1) the Commission regulates the offering process under the Securities Act; (2) it has the authority to define and permit or prohibit manipulative acts in the purchase and sale of securities under the Exchange Act; and (3) it has oversight responsibility for the securities self-regulatory organizations that also are required to regulate broker-dealers, including in the offering and trading processes. This authority is plenary—it encompasses all aspects of the underwriting syndication system, as well as aftermarket trading. Acting pursuant to it, the Commission has adopted comprehensive sets of regulations.

1. Commission regulation of the securities offering process.

The Securities Act provides the Commission with authority to regulate the public offering of securities. *See*, Section 5 of the Securities Act, 15 U.S.C. 77e, and the Commission's rules and regulations thereunder; *see generally*, Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation*, 82-113 (4th ed. 2001). Among the restrictions imposed on non-exempt offerings of securities are the prohibition on offers before a registration statement is filed with the Commission, and limitations on the types of oral and written communications that those offering securities may make with potential buyers after the registration statement is filed, but before it becomes effective. The "roadshows" and other communications described by plaintiffs occur during this period. Relevant laws and regulations include Section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3), which excludes communications among underwriters who are in privity of contract with the issuer of the security from the scope of the offering restrictions; Securities Act Rule 134, 17 C.F.R. 230.134, which assists the process of building the book by permitting collection of indications of interest in the IPO, and Rules 137, 138 and 139, 17 C.F.R. 230.137-139, which are concerned with permitted communications through issuance of research reports.

The Commission's Rules 460 and 461, 17 C.F.R. 230.460, 230.461, further recognize the role the underwriters, acting individually or through a syndicate, play in disseminating information about the securities offering and the issuer of the securities. In making a public interest finding to make a registration statement for an offering effective, the Commission, acting through its Division of Corporation Finance pursuant to delegated authority, will consider, among other things, the adequacy of the disclosures in the registration statement, whether the underwriters have

received and disseminated information in sufficient time to enable investors to make decisions and whether the NASD has approved the underwriter's compensation in the offering.

2. Commission authority to regulate or prohibit manipulative conduct.

A second set of provisions, contained in the Exchange Act, give the Commission authority to define manipulative practices and adopt rules to permit and regulate, or to proscribe and prevent, such conduct. For example, Section 9(a), 15 U.S.C. 78i(a), outlaws certain forms of manipulative conduct involving securities listed on exchanges, and also empowers the Commission to determine whether certain potentially abusive practices involving those securities should be prohibited, permitted, or regulated. Section 10(b), 15 U.S.C. 78j(b), gives the Commission broad rulemaking authority to address manipulation and fraud, declaring it unlawful for any person to employ "any manipulative, deceptive, or other fraudulent device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Section 15(c)(1), 15 U.S.C. 78o(c)(1), prohibits securities broker-dealers, like the underwriter defendants in this case, from effecting any securities transaction "by means of any manipulative, deceptive, or other fraudulent device or contrivance" (Section 15(c)(1)(A)), and also gives the Commission the power for purposes of that section "by rules and regulations, [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. 78o(c)(1)(D).

The Commission has implemented these statutes by adopting rules that address manipulate (and deceptive) conduct. *See* Exchange Act Rules 10b-1 through 10b-18, 17 C.F.R. 240.10b-1–240.10b-18; 15c1-1 through 15c1-9, 17 C.F.R. 240.15c1-1–240.15c1-9; 15c2-1 through 15c2-11, 17 C.F.R. 240.15c2-1–240.15c2-11. It has also issued interpretations to clarify what conduct violates those

provisions, and brought enforcement actions to remedy violations.

Of particular relevance to the allegations in this case is Regulation M,17 C.F.R. 242.100-105, adopted in 1996 pursuant to several provisions of the federal securities laws to replace former Rules 10b-6, 10b-6A, 10b-7, 10b-8, and 10b-21 (commonly known as the "trading practice rules") under the Exchange Act. *See* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Dec. 20, 1996).

Like the former trading practice rules, Regulation M's prophylactic prohibitions are intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the "true" state of the public market for the security being distributed. In particular, Regulation M prohibits issuers, selling security holders, underwriters, and other distribution participants from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the specified restricted period. Regulation M also governs "stabilization" (efforts to prevent the price to fall below the offering price during the offering) and related activities in connection with an offering, such as syndicate covering transactions and penalty bids.

3. Commission oversight responsibility for the NASD.

Finally, through its regulatory oversight pursuant to the Exchange Act of National Association of Securities Dealers, Inc., the sole national securities association registered with the Commission, the Commission has direct and pervasive authority to oversee the regulation of broker-dealer conduct, such as communications, commissions, and underwriter fee arrangements. *See e.g.*, Exchange Act Sections 3(a)(26), 15A(a) and (b), 15 U.S.C. 78c(a)(26), 78o-3(a) and (b) (conditions for registration with the Commission of a

national securities association that will function as a self-regulatory organization). Section 15A(e) of the Exchange Act, 15 U.S.C. 78o-3(e), and NASD Rule 2740 have the effect of requiring that members of underwriting syndicates be members of the NASD, so that NASD rules governing offerings apply to all syndicate participants.

The NASD comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission. For example, the NASD's corporate financing rule addresses underwriter compensation, including the amount of compensation that underwriters may receive. *See* NASD Rule 2710. NASD Rule 2330 prohibits member firms from profit sharing in customer accounts. NASD Rule 2110 and IM 2110-1 protect the integrity of the public offering process by requiring participants in the offering syndicate to make *bona fide* offerings, and not to withhold securities for their own benefit or use allocation of securities to reward persons for future business.[4]

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The scope of these three grants of authority, particularly when considered together as parts of a unified regulatory system, demonstrates that Congress intended for the Commission to exercise its broad regulatory mandate with a wide zone of conduct by those involved in the securities industry, and in the public offering process in particular.

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[4] Some of the other NASD rules that address various aspects of the syndicate underwriting process include Rules 4624 and 6540 (penalty bids and syndicate covering transactions by the syndicate manager), and Rule 2770 (disclosure of the selling price in selling agreements). Other SROs also have rules regarding the syndicate underwriting process. *See e.g.* NYSE Rule 392 (disclosure of syndicate members for offerings of listed securities).

B. The Commission is actively pursuing possible regulatory responses to the types of practices alleged by plaintiffs.

1. When it proposed and adopted Regulation M, the Commission announced that it would gather information about activities in the aftermarket for offerings so that it could evaluate whether any additional regulation was necessary. SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996); SEC Release No. 33-7375, 62 Fed. Reg. at 537-38. The Commission planned this review in order to address commenters' concerns that certain aftermarket activities were manipulative. Pursuant to that announcement, the Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether the provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.

2. The Commission recently brought an injunctive action alleging that an underwriter violated the federal securities laws and the rules of the NASD by engaging in practices similar to some of those alleged in the complaint. *See* Hunter Dec. Ex. Y, Z.[5] The NASD brought a related disciplinary proceeding alleging that the misconduct also violated NASD rules. The underwriter settled the cases by consenting to the entry of an injunction in the Commission's case and of findings by the NASD, without admitting or denying them. Ex. Z at 3-14. Among the remedial relief

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[5] The gravamen of the Commission's complaint and the NASD action was that the underwriter allocated hot issue shares to customers who agreed to pay the underwriter a portion of their profits from reselling those shares in the form of excessive commissions on transactions in other securities.

agreed to as part of the settlement of the two proceedings, the underwriter agreed to pay a total of $100 million, to be enjoined from future violations, and to adopt extensive new policies and procedures.

3. The Commission has also announced that it and the SROs are investigating possible violations of existing statutes, regulations and rules concerning the price setting process and the allocation practices of the underwriters of some hot issues. "Chairman Pitt Seeks Review of Initial Public Offering Process," SEC Press Release No. 2002-127 (Aug. 22, 2002) (copy attached). Among the allegations the Commission described were that "to obtain IPO allocations, some investors paid excessive commissions, or may have been induced to purchase shares in the aftermarket, distorting the market for these securities."

4. The NASD is actively reviewing these issues, as well. During the past four years, the NASD and the Commission have been involved in the process of restructuring the Free Riding and Withholding Interpretation, NASD IM 2110-1. The Commission has recently issued a release noticing for comment the fourth amendment to the NASD's proposal. If approved, the revised rule would become NASD Rule 2790. *See* SEC Release 34-46942 (Dec. 4, 2002).

In addition, the NASD recently sought comment from its members on proposed new rules regarding the regulation of IPO allocations and distributions. *See*, NASD Notice to Members No. 02-55: "Regulation of IPO Allocations and Distributions" (August 2002)). Among other things, the proposal would prohibit allocation arrangements involving the payment of undisclosed excessive commissions; aftermarket "tie-in" agreements; and the allocation of IPO shares to an executive officer or director of a company on the condition that the officer or director send the company's investment banking business to the member, or as consideration for investment banking services previously

rendered. While no proposals have yet been submitted to the Commission, any that are eventually made would present an opportunity for the Commission and others, through the notice and comment process, to consider whether additional regulatory responses are appropriate.

5. Finally, in August of this year, the Commission Chairman requested the NYSE and NASD to appoint a Blue Ribbon Panel to investigate whether additional rulemaking beyond that now under consideration is required. *See* "Chairman Pitt Seeks Review of Initial Public Offering Process." As explained in the press release, the Chairman asked those SROs "to undertake a broader review of the IPO process to determine if the additional rulemaking being contemplated will be sufficient to strengthen the integrity of the offering process and to better protect investors." Specifically, he "requested that the NASD and NYSE jointly convene a high-level group of business and academic leaders to conduct this broader review, and suggested that this committee should consist of distinguished representatives of issuers, underwriters, investors, academics and other market participants." August 22 Press Release. The committee appointed in response to this request has met twice, and hopes to issue a report by March, 2003.

II. Immunity is necessary in order to permit the regulatory regime to function as envisioned by Congress.

Syndicated underwritings are, by definition, joint activities in which potential competitors fix prices and engage in other collective activity that would raise substantial antitrust concerns, absent an appropriately broad finding of immunity.[6] Immunity is particularly important at this time,

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[6] The Commission discussed the history of syndicate underwriting in *In re NASD, Inc.*, 19 S.E.C. 424, 451-48 (1945). (cont'd)

when the Commission is actively engaged in determining whether various aspects of the regulatory regime applicable to activities related to syndicated underwritings should be revised in light of current conditions to strengthen the integrity of the offering process and to better protect investors, including investigating claims that underwriters have engaged in the sorts of purportedly illegal conduct alleged by plaintiffs.

Though implied immunity is generally to be disfavored, and is to be found "only if necessary to make the subsequent law work, and even then only to the minimum extent necessary," it is well-established that Congress is deemed to have repealed the antitrust laws in enacting statutes creating a regulatory system when there is a "a convincing showing of clear repugnancy between the antitrust laws *and the regulatory system.*" *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (emphasis added). "Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge." *Id.*, *citing United States v. NASD*, 422 U.S. 694, 730-34 (1975); *Gordon v. NYSE*, 422 U.S. 659, 689-90 (1975).

To paraphrase the Supreme Court's language in discussing immunity for securities exchanges performing their self-regulatory function, courts in deciding whether conduct by regulated entities is immune should ascertain

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(... cont'd)

See also United States v. Morgan, 118 F. Supp. 621, 635-49 (S.D.N.Y. 1953). A more recent discussion of the syndicate underwriting process may be found in Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation*, 66-74 (4th ed. 2001).

whether there is something "built into the regulatory scheme which performs the antitrust function of insuring that" those entities "will not in some cases" act "so as to injure competition which cannot be justified as furthering legitimate" ends within the scope of regulatory regime. *Silver v. NYSE*, 373 U.S. 341, 358 (1963). Under the federal securities laws, it is the Commission, not private antitrust plaintiffs, that is charged with performing the antitrust function of insuring that participants in a syndicated underwriting do not act so as to do injury to competition that is not justified by legitimate regulatory objectives.

In this case, Congress has made its intentions manifest, not implicit, in the express language of the federal securities laws. Thus, in 1975 and again in 1996 Congress amended those laws to expressly direct the Commission to balance competition in its rule makings, establishing a different, and more hospitable, standard for overruling competition than that adopted by the courts when Congress has not spoken. And, as noted above, the Commission is actively in the process of performing that function, both by considering whether enforcement actions are appropriate, and by examining whether regulations and rules should be revised. This process should not be disrupted by allowing antitrust plaintiffs to step in with their own set of standards, which could potentially be inconsistent with the Commission's determinations.

Plaintiffs claim that there can be no repugnance between the antitrust laws and the securities regulatory regime whenever the challenged conduct, if proven, would be contrary to some provision of the securities laws (Pl. Br. 15).[7] This argument—that rather than determining whether

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[7] Plaintiffs do not cite any case that adopts their proposed bright-line rule that any conduct that violates a provision of a regulatory regime cannot be immune from the antitrust laws. Nor

(cont'd)

Congress has entrusted the antitrust function to a regulator, courts should consider whether the challenged *conduct* is consistent with the regulatory regime—was considered and expressly rejected in the leading decision in this area, *Gordon v. NYSE*, 422 U.S. 659 (1975).

In that case, the Supreme Court found immunity for the then-existing system of minimum fixed commissions established by the New York and American Stock Exchanges, even though, like syndicates, fixed commissions involved inherently anticompetitive conduct, and even though the Commission had earlier decided to abolish them after a five year phase-in period. Plaintiff (supported by the Department of Justice) urged that because the Commission had determined to abolish fixed commissions, those commissions could not be thought necessary to the proper functioning of the securities laws. The Court explained that plaintiffs in *Gordon*, like plaintiffs in this case, had "confused two questions," namely the factual question of whether "fixed commission rates are actually necessary to the

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(... cont'd)

do *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939) and *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 215-17 (1966)), in which conduct that had not been approved by the regulator was held not to be immune, support that broad principle. The statutes governing the regulatory regimes at issue in those cases provided that certain agreements that had been approved by the regulator were immune. It would have defeated the Congressional objective if regulated, but unapproved, agreements were also immune. Those decisions, therefore, tell us nothing about the circumstances under which prohibited conduct should be held immune when, rather than expressly stating the conditions for immunity, Congress has instead entrusted a regulator with determining what degree of competition is appropriate.

operation of the exchanges" and the legal question of "whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates." 422 U.S. at 688. The relevant question was not whether the fixed commissions were consistent with the securities laws, but "whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Id.* The issue of whether fixed rates were appropriate would become important "only when it is determined that there is no antitrust immunity." *Id.*

The Court in *Gordon* thoroughly examined the history of fixed commissions, and of the Commission's authority over commission rates under the Exchange Act, 422 U.S. at 663-82, including the Commission's review and approval of fixed commissions and of the challenged rules over the years, as well as the then-recent amendment to the Exchange Act (Section 19(b)(9)) that explicitly gave the Commission authority to approve fixed commissions in the future. Based on that examination, the Court concluded that the exchange rules establishing minimum commission rates were not subject to the antitrust laws.

The Court's language reached beyond conduct that was permissible under the Commission's rules, and held that the statutory framework and the Commission's active execution of its duties under that framework foreclosed antitrust examination of conduct within the Commission's regulatory jurisdiction because of the *potential* that the regulator and the antitrust court could impose different standards:

> to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. * * * [T]he commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or

> requirements, the exchanges *might* find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings *would conflict with the regulatory scheme* authorized by Congress rather than supplement that scheme.

422 U.S. at 689 (emphasis added, footnote omitted).

The Court reiterated this conclusion in language that referred not only to past practices, but also to Congress's then-recent amendment of Section 19(b) of the Exchange Act, which made the Commission's continuing authority explicit:

> In sum, the statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. *The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC.* Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; *failure to imply repeal would render nugatory the legislative*

provision for regulatory agency supervision of exchange commission rates.

422 U.S. at 691 (emphasis added). Thus, in the words of the leading treatise, *Gordon* holds that the antitrust laws are "inapplicable" to the practice of prescribing fixed commission rates "because the Securities Exchange Act had authorized the Securities and Exchange Commission to control or prevent such practices." 1A Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 240c5 (2d ed. 2000). For the same reasons, the antitrust laws should be held to be inapplicable to the practices challenged in the case now before the Court because the securities laws authorize the Commission to control or prevent those practices.

Further guidance is found in *United States v. NASD*, 422 U.S. 694 (1975), handed down on the same day as *Gordon*. In that case, the Court upheld immunity for conduct subject to pervasive Commission regulation. Investors and the Department of Justice brought an antitrust challenge against certain restrictions imposed on resale in the secondary market of mutual fund shares. Plaintiffs alleged that the restrictions were both vertical (imposed by mutual fund underwriters in their agreements with broker-dealers) and horizontal (agreed to by the members of the NASD among each other). The purpose of these restrictions was to prevent development of a secondary market for mutual funds, i.e., a market existing outside the usual distribution and redemption channels.

The Court upheld the vertical agreements because Section 22(f) of the Investment Company Act authorized mutual funds to impose restrictions on the negotiability and transferability of their shares, provided, *inter alia*, that the restrictions did not contravene any rules and regulations of the Commission, and the Commission had not adopted any rules that prohibited the challenged conduct. The Court found that agreements were immune from antitrust liability because the Commission's decision not to act was "an informed

administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the problems of the industry." 422 U.S. at 728.

More pertinent to this case is what the Court said about the alleged horizontal agreements, which did not fall within the scope of Section 22(f), but which were nevertheless held to be immune. The Court framed the issue as whether the Commission's "exercise of regulatory authority" under the ICA and the Maloney Act "is sufficiently pervasive to confer implied immunity." 422 U.S. at 730. The Court held that an antitrust challenge was "precluded by the regulatory authority" vested in the Commission:

> There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned * * * , and the history of Commission regulations suggests no laxity in the exercise of this authority. *To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them.*

422 U.S. at 734 (emphasis added). Using the same reasoning, we conclude that Congress gave the Commission "ample authority" to eliminate practices like those alleged in this case, to the extent that the Commission finds they are inappropriate, and it should be left free to do so.

The Second Circuit has distilled the rules of *Gordon* and *NASD* as follows:

> There are two narrowly-defined situations in which 'repeal' of the Sherman Act will be inferred: first, when an agency acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, [*Gordon*], and second, when the regulatory

> scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition [*NASD*].

Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981); *see also Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990) (reviewing antitrust immunity under the securities laws, and discussing the *Gordon* and *NASD* decisions); 1A Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* 34-61 (2d ed. 2000). As we have noted, the Commission believes that the challenged conduct is immune under both theories.

The parties before this Court have focused on the Second Circuit's decision in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), *see* Def. Br. at 17-18; Pl. Br. at 24-25. Plaintiff in that case was the victim of a massive price manipulation scheme in potatoes futures, and he sued the perpetrators under both the Commodity Exchange Act and the antitrust laws. Those defendants argued that because of the regulatory regime in place, "conduct specifically prohibited by the [CEA] cannot be the basis for a treble damage award under the antitrust laws." 768 F.2d at 24. The Second Circuit rejected the argument with respect to the conduct and the regulatory regime in that case, but its reasons for doing so support a finding of immunity in the case at bar. The court summarized its views of the relevant teachings of *Silver* and *Gordon* as follows:

> antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme *might* allow. * * * The "plain repugnancy" found in *Gordon* was the *potential* for conflicting standards and the fact that application of antitrust laws would render § 19(b)(9) of the Securities Exchange Act [granting the Commission authority over exchange rules governing the fixing of commission rates] nugatory. Thus, repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap.

768 F.2d at 27 (emphasis added, internal citations omitted).

The court found no immunity because the manipulative conduct alleged was absolutely prohibited by both the antitrust laws and the CEA, so there could be no conflict: "There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former." 768 F.2d at 28.[8]

The situation under the securities laws is quite different. In contrast to the CEA, "a little price manipulation" is permitted under the securities laws in the form of price stabilization in connection with an offering, subject to detailed Commission regulation. *See* Regulation M, 17 C.F.R. 242.104 (permitting certain conduct to stabilize the price of securities at or below the offering price, providing that the requirements of the regulation are met). And, in

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[8] The court also rejected decisions adopting the so-called "single remedy rule," under which private remedies under a specifically applicable regulatory statute must be pursued "instead of an action under the more general interdiction of the antitrust laws." 768 F.2d at 29, *citing Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) and *Schaefer v. First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill. 1970), *aff'd in part and rev'd in part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 94 (1976). Defendants do not challenge this aspect of *Strobl*, and consequently, the Commission does not here express any views on the correctness of the single remedy rule. *Cf. Olmsted V. Pruco Life Insurance Company of New Jersey*, 283 F.3d 429, 435 n.5 (2d Cir. 2002) (court will ordinarily not consider an argument raised only by an *amicus*).

contrast to the commodities situation, syndicate underwriting requires potential competitors to come together for the purpose of setting prices and otherwise agreeing on how securities will be offered. More fundamentally, rather than laying down broad statutory bars on all types of manipulative conduct, the securities laws authorize the Commission to adopt and enforce appropriate regulations that balance competition along with other public interest and investor protection concerns.

We have already noted that Sections 9(a), 10(b) and 15(c) of the Exchange Act give the Commission broad authority to define and permit or prohibit activities that could be deemed forms of manipulation. Furthermore, the Securities Act and the Exchange Act grant the Commission broad exemptive authority even with respect to statutory prohibitions and requirements. Section 28 of the Securities Act, 15 U.S.C. 77z-3; Section 36 of the Exchange Act, 15 U.S.C. 78mm. Taken together, the grants of rulemaking authority and exemptive authority give the Commission broad authority to determine what sorts of conduct should be banned as improper manipulation, and also to set the terms under which such conduct may be permitted, if it serves the public interest.

Given this statutory approach of delegating rulemaking and exemptive power instead of adopting broad statutory prohibitions, there is a much greater possibility under the securities laws than under the CEA that the antitrust laws "would prohibit an action that a regulatory scheme might allow," creating the "potential for conflicting standards" and rendering Commission authority over various practices "nugatory." That continues to be true even if the conduct alleged, if properly pleaded and proved, is unlawful under current statutes, rules and regulations. Indeed, it is true even if the Commission ultimately brings enforcement actions challenging this conduct because, as the Supreme Court indicated in *Gordon*, the concern is with protecting the full

scope of the regulatory regime, and of the Commission's freedom to act, not with whether the particular conduct has been approved. Consequently, immunity *is* required here for the same reasons that it was *not* required in *Strobl*.

Thus, unlike the situation addressed in *Strobl*, this case is similar to *Austin Municipal Securities, Inc. v. NASD*, 757 F.2d 676 (5th Cir. 1985), where the court agreed with the Commission that broad immunity was required for an entire process that was subject to Commission oversight. Plaintiffs in *Austin Municipal Securities*, a securities brokerage firm and five of its associates, alleged that competing firms had conspired to initiate an NASD disciplinary proceeding against it as a means of interfering with its business. The court's concern, similar to the Supreme Court's in *Gordon* and the Second Circuit's in *Strobl*, was that "[s]uperimposing the antitrust laws on the securities laws would unduly interfere with the SEC's jurisdiction" because "[c]ourts might fashion standards that are duplicative or inconsistent with the securities laws and SEC rules." 757 F.2d at 695. Furthermore, the court emphasized, the concerns of the antitrust laws will be addressed in the context of Commission oversight of the NASD disciplinary process because Congress required the Commission to evaluate the anticompetitive effects of its actions. *Id.* "Therefore, the federal antitrust laws are not to be applied to the NASD disciplinary process." 757 F.2d at 695. Or, we would add, to the conduct by members of underwriting syndicates challenged here.

In *In re: Stock Exchanges Options Trading Antitrust Litigation*, 171 F. Supp.2d 174 (S.D.N.Y. 2001), the Commission urged that antitrust immunity was not necessary with respect to conduct that the Commission had decided, in the exercise of its policy-making judgment, should be

governed by the competition in a free market rather than by regulation.[9] The Commission cautioned, however, that this did not mean that any conduct that was contrary to Commission rules or regulations could never be immune. Rather, it observed that *Gordon* was not entirely clear on this point, and indicated that in another case there might be a strong indication that Congress "intended the regulator to be the sole authority with respect to the conduct at issue," *citing Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 303 (1973), or "there may be ongoing regulatory supervision and fine-tuning of conduct by the regulator that would be impaired if the conduct were subject to antitrust liability." In our view, the conduct alleged by plaintiffs falls into these categories, and it should therefore be immune, even if the Commission decides after investigation that the conduct violated the securities laws.[10] We believe this result is

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[9] The *Options* case differed from this case in that the Commission had made the regulatory decision to permit free competition, rather than regulation, to determine the allocation of options among exchanges. It has never made a comparable decision to deregulate the syndicated offering process. The district court disagreed with the Commission and found that the alleged conduct would be immune out of concern that permitting an antitrust remedy for conduct that was currently prohibited could interfere with the Commission's ability to change its mind in the future. That case is on appeal to the Second Circuit, No. 01-7371 (2d Cir.). But even if the court of appeals concludes that there is no immunity in the *Options* case for the reasons outlined by the Commission in its *amicus* statement, there should still be immunity in this case because the conduct continues to be subject to the Commission's comprehensive regulation.

[10] At approximately the same time as it filed the *Options* statement, the Commission also filed an *amicus* brief in the Second Circuit urging that immunity *should* be found with respect to conduct by underwriters to stabilize the prices of newly offered securities. *Friedman v. Salomon Smith Barney, Inc.*, No. 01-7207 (cont'd)

particularly required now, as the Commission is actively engaged in considering appropriate responses to the very same types of conduct that plaintiffs' allege.

III. Plaintiffs seek to displace the Commission's regulatory authority by basing their antitrust case largely on inferences they wish to draw from certain conduct that is permitted by the Commission, and by giving an antitrust court the responsibility for interpreting and applying the securities laws.

Plaintiffs seek to replace the securities regulatory regime applicable to syndicate underwriting with the antitrust laws. The Commission is not suggesting that any good purpose is served by conduct that violates the securities laws, or that such illegal activities should go unremedied. Rather, it seeks to protect its Congressionally created regulatory authority, and important economic activities that are carried on subject to that authority, from being disrupted by private plaintiffs pursuing claims under the antitrust laws. Decisions on whether the securities laws have been violated, or on whether particular conduct should be regulated or prohibited under those laws, ought to be made in the context of the securities regulatory regime, not as an ancillary question in an antitrust case. It is important to that regime, and to the proper functioning of the economic system that it regulates, to avoid

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(... cont'd)

(2d Cir.). The Commission relied on the facts that the conduct was subject to the Commission's regulatory oversight under the stabilization rules, that the Commission had long been aware that this conduct often occurred, and that it had not prohibited the conduct. Thus, in the Commission's view, the situation was very similar to horizontal agreements that were found immune in *NASD*. *Friedman*, like *Options*, is also still pending in the court of appeals.

the uncertainties that would arise if an antitrust court ruled that conduct that the Commission considers improper is permissible, or that conduct that the Commission believes should be allowed is unlawful.

In that regard, plaintiffs' complaint raises two substantial difficulties: First, to a large extent, it asks this Court to draw an inference of illegality from the mere fact that defendants acted jointly as participants in syndicate underwritings. Second, and more fundamentally, even if it is assumed that plaintiffs have adequately alleged illegal conduct, that conduct is subject to the Commission's comprehensive regulation, which has been, and is at this time being, actively implemented.

A. Plaintiffs seek to prove an antitrust case based on inferences of illegal conduct drawn from the fact that defendants engaged in certain lawful, regulated conduct.

Plaintiffs' core allegations of violative conduct seem to be that underwriters of technology stocks agreed among themselves to require purchasers of "hot issue" initial public offerings to promise, as a prerequisite to the purchasers receiving allocations in the offering, that they would make aftermarket purchases of securities at times and prices determined by the underwriters, and that they would kick back some of the profits from their transactions in these securities to the underwriters. This scheme, plaintiffs assert, was implemented "through and in connection with their agreements to combine together into underwriting syndicates" (Complaint, ¶ 49).

When plaintiffs turn from these conclusory allegations of an illegal conspiracy to the relatively concrete allegations of specific conduct that is claimed to violate the antitrust laws, however, they allege almost entirely that defendants engaged in joint activities that are necessary to conduct syndicated underwriting under the system that has been used in the

United States for decades, joint activities that are pervasively regulated and approved by the Commission.

Thus, the complaint describes the syndicate underwriting process, and avers that, in plaintiffs' opinion, syndicates are no longer necessary to effectuate offerings. Complaint ¶¶ 36-37. Nonetheless, plaintiffs say, and contrary to the way that plaintiffs believe securities should be offered, "defendants still regularly combine with one another * * * into underwriting syndicates." Complaint ¶ 38. Furthermore, plaintiffs state, defendants agreed that the lead underwriter could distribute all the shares for each offering, and that syndicate members who did not sell all of their allotment nevertheless shared in the underwriters' discount. Complaint ¶ 39. The aforementioned conduct alleged in paragraphs 38 and 39 is permissible under Commission regulations and governing self-regulatory organization rules.

Plaintiffs further aver that defendants engaged in the following activities, none of which are improper under the governing regulations:

> continuously communicating and working together as co-underwriters and members of syndicates and as market makers (Complaint ¶ 45);
>
> collaborating with one another in trade associations such as the SIA (Complaint ¶ 46);
>
> communicating with each other as members of the NASD, belonging to and trading on NASDAQ and securities exchanges, and creating joint ventures such as Stock Edge LLC and Bond Book LLC (Complaint ¶ 47);
>
> holding meetings among top investment bankers, legal officers, and marketing managers (Complaint ¶ 48);
>
> disclosing to each other the identities of the customers to whom they allocated, or intended to allocate, offered securities (Complaint ¶ 56); and maintaining systems that promptly informed defendants of commission, charges,

and other payments that their customers were making and the customers commissions-to-equity rations and turnover ratios (Complaint ¶ 62).

We do not address whether the allegations in the complaint meet the requirements of Fed. R. Civ. P. 8(a). Our concerns are not with pleading standards, but with the harm that will be done to the securities regulatory system, and to the system for offering securities through underwriting syndicates, if antitrust claims may rest on "allegations" that defendants engaged in certain permissible, regulated conduct, combined with conclusory assertions that during the course of these activities, defendants conspired to violate the law.

To sustain a case based on these sorts of allegations threatens the Commission's regulatory authority because certain conduct that the Commission has approved will be the basis for potential antitrust liability, which would have the effect of negating the Commission's determination that the conduct should be permitted, or even that it is necessary in the public interest. It also threatens the syndicate offering system because mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants. For that reason alone, the challenged conduct should be held immune.

B. Assuming Plaintiffs Have Adequately Alleged Conduct That Violates the Securities Laws, Immunity is Necessary to Permit the Commission to Carry Out its Regulatory Functions, and to Prevent Interference with the Commission Approved and Regulated Syndicated Underwriting Process.

We have briefly described above the Commission's authority with respect to syndicate underwritings under the Securities Act and the Exchange Act. Pursuant to that authority, the Commission engages in four functions that would be threatened if immunity is denied in this case.

1. The Commission must make rules and regulations that interpret and implement the governing statutory provisions. As noted, the securities laws rely on Commission rulemaking authority to carry out Congress's objectives. For example, in contrast to the commodities statute at issue in *Strobl*, which flatly prohibited manipulation, the securities statutes combine specific statutory provisions with broad grants of rulemaking authority and exemptive authority to the Commission. Competition is to be considered as one factor, but it is not given predominance. Plaintiffs seek to overlay antitrust principles on the Commission's jurisdiction, overruling the Congressional regulatory regime in this respect.

2. In addition to adopting rules and regulations, the Commission must interpret the statutes it administers, as well as its rules and regulations, in various contexts. For instance, plaintiffs allege that defendants' failed to make required prospectus disclosure (Pl. Br. 25-27), while defendants respond that the disclosure was not required by the applicable Commission regulation and NASD rules (Def. Br. 10-12). The Commission has not had occasion to address that issue, yet plaintiffs now ask this Court to interpret those provisions as part of the determination of whether defendants violated the antitrust laws, to lift the antitrust immunity if defendants' interpretation is incorrect, and to hold defendants liable for treble damages.

Plaintiffs also allege that defendants have engaged in a market manipulation. However, as noted, much of the more specific conduct alleged regarding the syndicated offering process is lawful, and other of it may or may not be permissible, depending upon the facts. Certainly there can be clear cut violations of the governing regulations, but application of the securities laws to particular conduct may involve complex considerations of fact, law and policy. These questions should be addressed under the securities laws, not in an antitrust case.

3. The Commission investigates the facts, both of particular transactions and of industry-wide trends and practices. It is currently investigating both aspects of IPO practices. An antitrust court cannot be expected to substitute for the Commission's responsibility to assess whether enforcement actions, legal interpretations, additional rulemaking, or other actions are necessary or appropriate in the public interest, for the protection of investors, to promote capital formation, while protecting competition to an appropriate degree. The proper mechanism to make the relevant determinations is to allow the Commission to administer the regulatory process.

4. Finally, the Commission has an obligation to continue to develop the law in the public interest, to better protect investors and the securities markets in the light of new circumstances. It is doing so at the present time, including through the Blue Ribbon panel the Commission's Chairman asked the NASD and the NYSE to convene. Permitting private antitrust plaintiffs to provide their own solutions to these perceived problems could impede and frustrate the Commission's ongoing efforts.

CONCLUSION

A failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission's ability to exercise its regulatory authority. Furthermore, the threat of antitrust liability and remedies will likely have a chilling effect on syndicate underwritings and other lawful joint activities, activities of tremendous importance to the economy of the country. Last year, underwriters raised some $2.5 trillion for American companies and, in the past decade, this number was $12 trillion. Regulation of this crucial segment of the economy should remain in the hands of the Commission, where Congress placed it. For those reasons, this Court should follow the lead of the Supreme Court in *Gordon* and *NASD* and hold that the alleged conduct in this case is immune from challenge under the antitrust laws.

Respectfully submitted.

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION	:	Case No. 01 CIV 2014 (WHP)

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

QUESTION PRESENTED 2

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Implied Antitrust Immunity Requires a "Convincing Showing of Clear Repugnancy" Between the Regulatory Scheme and the Application of the Antitrust Laws 6

A. A Broad Regulatory Scheme Does Not Automatically Displace the Antitrust Laws 9

B. The Key Question Is Whether the Challenged Conduct Has Been Expressly or Implicitly Authorized Under the Regulatory Scheme 10

C. Immunity for Past Unapproved Conduct Is Not Required To Preserve Regulatory Flexibility 14

II. Because the Complaints Allege Conduct Prohibited by the Securities Laws, They Should Not Be Dismissed on Implied Immunity Grounds Under Rule 12(b)(6) 16

CONCLUSION 24

TABLE OF AUTHORITIES

[table omitted in printing]

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

The United States submits this Memorandum in response to the Court's request for its views regarding the implied immunity issue raised by defendants' motion to dismiss the complaint under Rule 12(b)(6).

STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws, which express the nation's fundamental economic policy in favor of free competition. Accordingly, the United States has an interest in the well-established rule that, although federal regulatory statutes on occasion clearly indicate that Congress intended to limit antitrust enforcement to prevent conflict with other federal policies, implied repeal of the antitrust laws is disfavored and may be found only when and to the extent necessary to make a federal regulatory program work as Congress intended.

QUESTION PRESENTED

Whether antitrust complaints alleging that defendant underwriters violated the federal antitrust laws by imposing charges and conditions prohibited by the securities laws and SEC regulations should be dismissed under Rule 12(b)(6) on implied immunity grounds.

STATEMENT

Plaintiffs are purchasers of certain technology stocks ("the Class Securities"). Defendants are major investment banks; they underwrote initial public offerings (IPOs) of those stocks and provided brokerage services. Am.

Complaint ¶¶ 33, 35.[1] The Amended Complaint alleges that the defendants agreed "to require from customers consideration in addition to the underwriters' discount . . . for allocations of shares of initial public offerings of certain technology-related companies . . . and to inflate the aftermarket prices for such Class Securities, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1." Am. Complaint ¶ 1. Plaintiffs contend that "pursuant to defendants' combination, conspiracy and agreement" these major underwriters required customers to pay, in addition to the authorized IPO prices, additional charges that were not disclosed in the prospectuses. *Id.* ¶ 4. The alleged charges included "non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), [and] commitments to purchase other, less attractive securities." *Id.* ¶¶ 4, 6. Plaintiffs allege that defendants also agreed "to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶¶ 4, 7.

Plaintiffs allege that defendants "abused the preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates," Am. Complaint ¶ 5; that plaintiffs and other class members purchased IPO shares either from the underwriters or in the aftermarket, *id.* ¶ 13; and that they were injured "in that [they] paid the anticompetitive charges and inflated aftermarket prices caused by [defendants']

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[1] "Amended Complaint" or "Am. Complaint" refers to the Consolidated Amended Class Action Complaint (Jan. 2, 2002).

unlawful agreement," *Id.* ¶ 9. The Pfeiffer Complaint[2] alleges that the underwriter defendants and institutional investors engaged in "commercial bribery and other conduct in violation of Section 2(c) of the Robinson Patman Act, 15 U.S.C. section 13(c)," Pfeiffer Complaint ¶ 6, as "part of a course of conduct developed by the Underwriter Defendants to inflate the price of particular securities," *id.* ¶ 3.

Defendants moved to dismiss the complaints under Rule 12(b)(6), on the grounds that: (1) "the IPO allocation and commission practices challenged . . . are comprehensively regulated under the securities laws, and thus immune from antitrust scrutiny," D. Mem. at 1;[3] (2) "plaintiffs . . . lack antitrust standing," *id.* at 2; (3) "the Amended Complaint is devoid of any factual allegations" that would establish an antitrust conspiracy, *id.* at 3; and (4) "the Amended Complaint fails to allege a legally cognizable market," *id.* at 4.[4]

This Court requested the Securities Exchange Commission and the Antitrust Division of the United States Department of Justice to present their views on the implied immunity issue.

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[2] "Pfeiffer Complaint" refers to the Class Action Complaint of plaintiff Milton Pfeiffer (Dec. 12, 2001).

[3] "D. Mem." refers to the Joint Memorandum of Law in Support of Defendants' Motion To Dismiss the Federal Law Claims in the Consolidated Amended Complaint (May 24, 2002).

[4] Defendants focus most of their attention on the Consolidated Amended Complaint. They also challenge the Pfeiffer complaint on the grounds of implied immunity and standing. *See* D. Mem. at 7-8, 62-70.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States expresses no view as to the merits of plaintiffs' claims that defendants have violated the federal antitrust laws. Section 1 of the Sherman Act focuses specifically on agreements that unreasonably restrain competition; the Robinson-Patman Act prohibits certain types of price discrimination. Neither is an all-purpose enforcement mechanism for attacking securities fraud or other illegal conduct.

Plaintiffs' complaints do not specify with precision the scope and nature of the alleged antitrust violations. Indeed, the Amended Complaint includes few specific facts in support of the conclusory allegations that defendants acted in concert and thereby restrained competition to plaintiffs' detriment. The United States takes no position as to whether the complaints are nonetheless sufficient to survive a motion to dismiss under Rule 12(b)(6) for failure to allege an antitrust offense or for lack of standing.

There is no basis at this point, however, for dismissing the complaints on the ground that regulation renders the alleged actions exempt from antitrust scrutiny as defendants claim. Because the Sherman Act implements a fundamental national policy favoring competition, a finding of implied immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (internal quotation omitted). In the absence of express or implicit authorization under the regulatory scheme for conduct alleged to violate the antitrust laws, there is no conflict and thus no clear repugnancy between the standards of the antitrust laws and federal securities regulation. The Amended Complaint and the Pfeiffer Complaint include allegations of conduct that the securities laws and SEC regulations clearly prohibit. Accordingly,

whether or not defendants have *violated* the Sherman Act or the Robinson-Patman Act, the conduct alleged in the complaints is not *immune* from scrutiny under the antitrust laws.

ARGUMENT

I. Implied Antitrust Immunity Requires a "Convincing Showing of Clear Repugnancy" Between the Regulatory Scheme and the Application of the Antitrust Laws

As the Supreme Court said over twenty years ago: "claims of antitrust immunity in the context of various regulated industries" have been frequent, and "[t]he general principles applicable to such claims are well established." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). Congress may exempt particular businesses or activities from the Sherman Act by an express provision in the regulatory statute. Moreover, in some circumstances, statutes authorizing regulation by an administrative agency may imply Congressional intent that the federal antitrust laws not apply to certain regulated conduct. Because "[t]he antitrust laws represent a 'fundamental national economic policy,'" *id.* (quoting *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966)), however, "'[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system,'" *id.* (quoting *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*")); *accord, Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981). The Second Circuit has consistently acknowledged and applied this fundamental principle. *E.g., Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985); *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990); *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3352 (U.S.

Nov. 1, 2002) (No. 02-682).[5] *See also Friedman v. Salomon/Smith Barney, Inc.*, No. 01-7207, slip op. at 6 (2d Cir. Dec. 20, 2002).

Defendants nonetheless argue for antitrust immunity even in the absence of statutory or regulatory approval—express or implicit—for the alleged conduct. Indeed, they contend that antitrust immunity may be appropriate even when challenged conduct is expressly prohibited by regulatory authorities. *See* Reply at 6, 9. Defendants insist that conduct should be deemed immune "when either (i) Congress has granted the SEC direct authority over the challenged conduct, and the Commission has exercised this authority, or (ii) the conduct at issue is subject to a pervasive regulatory scheme." Reply at 1, *see* D. Mem. at 14-20. In their view, even the possibility that some "potential conflict . . . may arise as the Commission refines the regulatory framework," Reply at 2, is sufficient to immunize past conduct in the securities industry from the antitrust laws. Defendants' novel and expansive view of implied antitrust immunity cannot be reconciled with

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[5] Defendants' attempt to distinguish *Trinko* as involving the communications laws rather than the securities laws (Joint Reply Memorandum of Law in Support of Defendants' Motion To Dismiss the Federal Law Claims in the Consolidated Amended Complaint at 3-4 (Aug. 7, 2002) ("Reply")) is inapposite. The Second Circuit expressly relied on "basic principles" developed in cases involving immunity claims based on securities, banking, and electric power regulation. *See Trinko*, 294 F.3d at 324-28. Moreover, even before the 1996 Act, the courts consistently had held that telecommunications carriers, while subject to extensive federal and state regulation, do not receive implied antitrust immunity. *E.g.*, *Northeastern Tel.*, 651 F.2d at 82-84. The specific antitrust savings clause in the Telecommunications Act of 1996 simply removed any plausible basis for contentions that Congress intended that Act to repeal (or expand) the antitrust laws as applied to conduct regulated under the Communications Act.

the Supreme Court's insistence on "a convincing showing of clear repugnancy" between the standards of the antitrust laws and the regulatory scheme, *National Gerimedical*, 452 U.S. at 379.

A. Broad Regulatory Scheme Does Not Automatically Displace the Antitrust Laws

The underwriting and sale to the public of newly issued securities are extensively regulated under the federal securities laws, but it does not follow that conduct related to this process is necessarily immune from the antitrust laws. As the courts have made clear, the existence of a regulatory scheme does not automatically establish the clear repugnancy between that scheme and application of the antitrust laws that is necessary to justify a finding of implied repeal. Rather, "'[r]epeal is to be regarded as implied only if necessary to make the [subsequent [regulatory] law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" *National Gerimedical*, 452 U.S. at 388 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). *Accord*, *Northeastern Tel.*, 651 F.2d at 83 (no implied immunity unless "application of the antitrust laws would be incompatible with the regulatory framework, that is, [unless] immunity must be inferred to make the system work").

Established law thus requires that the courts apply both the antitrust and the regulatory statutes to the extent they do not conflict. The Supreme Court has consistently rejected claims for "a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary." *National Gerimedical*, 452 U.S. at 392 (citing *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws")); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal

Power Commission regulation). Similarly, in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985), the Second Circuit expressly rejected the defendants' "over-simplified" argument "that *Silver* and *Gordon* can be read to say that when [an] activity is subject to the jurisdiction of some regulatory body, it is exempt from the antitrust laws." Rather, the question is whether there is "*conflict*[ ] between the antitrust laws and a regulatory scheme." *Id.* (emphasis in original). *See also Friedman*, slip op. at 6.

B. The Key Question Is Whether the Challenged Conduct Has Been Expressly or Implicitly Authorized Under the Regulatory Scheme

If neither Congress nor the regulatory agency has approved or authorized the conduct at issue, explicitly or implicitly, neither the existence nor the exercise of regulatory authority with respect to that conduct creates conflict between the regulatory scheme and the antitrust laws. Rather, there is conflict, warranting an implied exemption only when the antitrust laws "prohibit an action that a regulatory scheme permits." *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d. Cir. 1990) (citing *Strobl*, 768 F.2d at 27).

This authorization need not take the form of an explicit approval. Rather, conflict can also exist where the SEC "deliberately has chosen" not to exercise its authority to prohibit conduct. *Friedman*, slip op. at 9. Thus, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), for example, the fixed commission rates at issue had been approved, at the time, by the SEC through actions "having an effect equivalent to that of a formal order," 422 U.S. at 690 n.13. In *NASD*, the Court found immunity for activities expressly authorized by statute, for regulated activities "*approved* by the SEC," and for an alleged conspiracy "to encourage . . . precisely the restriction that the SEC consistently has approved pursuant to [statute] for nearly 35 years." 422 U.S. at 733 (emphasis added). Similarly, in *Finnegan v. Campeau*, the Second Circuit found implied

immunity for joint takeover bids "because the SEC has the power to regulate bidders' agreements under [the Williams Act] . . . *and has implicitly authorized them* by requiring their disclosure . . . as part of a takeover battle." 915 F.2d at 831 (emphasis added). Similarly, the Second Circuit found immunity in *Friedman* where the SEC made a "deliberate and significant" decision to not prohibit the challenged conduct. *Friedman*, slip op. at 11-12.

Implied immunity does not extend beyond the conduct that Congress or the regulatory agency has expressly or implicitly approved. Even an express exemption for agency-approved conduct creates no implied immunity for conduct that has not been approved. *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939) (Sherman Act was repealed as to marketing agreements approved by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, but not as to unapproved agreements); *Carnation*, 383 U.S. at 215-17 (price fixing agreements approved by the Federal Maritime Commission under the Shipping Act were exempt from the antitrust laws; unapproved agreements remained subject to the antitrust laws). More generally, implied immunity will not be based on agency authority to regulate a type of conduct if the regulator has not expressly or implicitly exercised its authority and authorized the conduct at issue. *E.g.*, *Northeastern Tel.*, 651 F.2d at 84 (FCC had initially permitted the allegedly anticompetitive tariff conditions to take effect, but because it had never approved the tariff, "no conflict will arise between the Federal Communications Act and the antitrust laws if we hold that [AT&T is] subject to antitrust liability for" those conditions).

Nor does application of the antitrust laws create a conflict if the regulatory agency has exercised its authority to *prohibit* the challenged conduct. Thus, the Second Circuit has squarely rejected the argument that "conduct specifically prohibited by the [applicable regulatory law] cannot be the

basis for a treble damage award under the antitrust laws." *Strobl*, 768 F.2d at 24. Reading *Gordon*, *Silver*, and other Supreme Court decisions to provide that implied repeal of the antitrust laws may be found *only* "when such laws would prohibit an action that a regulatory scheme might allow," 768 F.2d at 27, the Second Circuit in *Strobl* found no antitrust immunity for conduct (price manipulation), prohibited under both the Commodity Exchange Act and the antitrust laws.[6]

The Supreme Court also has underscored the importance of distinguishing between conduct approved under a regulatory scheme and conduct that violates regulatory norms. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1972), the Court affirmed a stay of antitrust litigation pending administrative proceedings to determine whether the conduct at issue violated Chicago Mercantile Exchange rules, reasoning that *if* the conduct "was pursuant to a valid rule," antitrust immunity might be implied. *Id.* at 303. If the conduct was contrary to the rules, however, the basis for an immunity argument "disappears entirely," *id.* at 308, and "the antitrust action should very likely take its normal course,

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[6] The district court in *Stock Exchanges Options Trading Antitrust Litigation*, No. 99 Civ. 962 (RCC), 2001 WL 128325 (S.D.N.Y. Feb. 15, 2001), we submit, did not properly apply established law in dismissing the complaint on implied immunity grounds. The United States has filed a brief as *amicus curiae* urging reversal in the pending Second Circuit appeal. Brief Amicus Curiae of the United States Urging Reversal (July 20, 2001), *Stock Exchange Options Trading Antitrust Litigation*, No. 01-7371 (2d Cir.). The SEC also filed an amicus statement in the district court in the *Options* case expressing its view that the conduct at issue was prohibited by SEC regulations and therefore not immune from the antitrust laws. *See* Statement of the Securities and Exchange Commission, as Amicus Curiae, on the Issue of Implied Repeal of the Antitrust Laws at 5-6 (June 16, 2000).

absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the [Commodities Exchange] Commission are exclusive," *id.* at 304.

C. Immunity for Past Unapproved Conduct Is Not Required To Preserve Regulatory Flexibility

Defendants assert that the mere possibility of regulatory approval in the future warrants antitrust immunity for past conduct (*see* D. Mem. at 18, 38-40). But, as the Supreme Court has recognized, applying the antitrust laws to conduct that was not approved by the regulators when it occurred does not conflict or interfere with regulatory policy. If the agency (or Congress) changes regulatory policy, subsequent conduct that is authorized under the new policy will be immune from the antitrust laws.[7] In *Carnation*, for example, the Court, drawing on *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952), held that courts may "subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." 383 U.S. at 221. And, "[t]he award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." *Id.* at 222. Similarly, injunctive relief that is

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[7] As the SEC explained to the district court in the *Options* case, "'the Commission's regulatory authority to revisit the decision embodied in [the rule prohibiting the conduct at issue] continues, and . . . a different judgment about the desirability of competition in the future could compel a different result on the implied repeal issue.'" 2001 WL 128325 at *9 (quoting SEC Amicus Brief at 7).

not "unconditional," *id.* at 221, would not interfere with future exercise of regulatory discretion.

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), is wholly consistent with these principles. There, the Court emphasized that the SEC had *approved* fixed commissions at the time the conduct at issue occurred, through actions whose effect was "equivalent to that of a formal order." 422 U.S. at 690 n.13. The SEC's subsequent decision to prohibit fixed commissions did not erase the preexisting conflict of standards as to the conduct for which treble damages were claimed, and a refusal to recognize immunity for conduct approved when it occurred "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Id.* at 691. The Court had no occasion in *Gordon* to rule on conduct that was not approved when it occurred, and its emphasis on the SEC's prior approval of fixed commission rates negates any suggestion that the Court considered the mere possibility of future regulatory approval a sufficient reason to find antitrust immunity. *See Strobl*, 768 F.2d at 27. *See also Friedman*, slip op. at 11-12 (SEC made a "deliberate and significant" decision not to prohibit conduct).

II. Because the Complaints Allege Conduct Prohibited by the Securities Laws, They Should Not Be Dismissed on Implied Immunity Grounds Under Rule 12(b)(6)

A Rule 12(b)(6) motion must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995). In this case, the Amended Complaint and plaintiffs' response to the motion to dismiss are less than clear as to who made the alleged agreement, what they agreed to do, what competition was restrained, and how the alleged competitive restraint operated to plaintiffs' detriment. Pfeiffer's complaint is similarly vague as to the "bribery" scheme he alleges.

Whatever the merits of these complaints as a matter of antitrust law—an issue on which the United States expresses no view – they are based in part on alleged practices that the securities laws and SEC regulations prohibit. Thus the Rule 12(b)(6) motion should not be granted on *implied immunity* grounds.

Prohibitions on fraud and manipulation in the sale of securities have been at the core of federal securities law since enactment of the Securities Act of 1933. Section 17(a) of the 1933 Act, 15 U.S.C. 77q(a), "the 'grandfather' of all the SEC fraud provisions," Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 838 (4th ed. 2001), prohibits all forms of fraud, and untrue or misleading statements or omissions of material facts, in the offer or sale of any securities. Section 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a), contains additional prohibitions on manipulation of prices for securities listed on a national securities exchange. Sections 9(a)(1)-(5) of the Exchange Act, 15 U.S.C. 78i(a)(1)-(5) prohibit a variety of transactions and techniques for the purpose of creating a false or misleading appearance of active trading, or for the purpose of raising or depressing the price of a security to induce sales or purchases. Section 9(a)(6), 15 U.S.C. 78i(a)(6), outlaws "pegging, fixing, or stabilizing the price of [a listed] security in contravention of such rules and regulations as the Commission may prescribe."

Securities and Exchange Commission Regulation M, 17 C.F.R. 242, is among the most important of the regulations that implement the statutory prohibitions on fraud and manipulation in connection with an offering of securities. Regulation M specifically provides that it is unlawful (with certain limited exceptions) for underwriters "directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period." Rule 101(a), 17 C.F.R. 242.101(a). Further, "[s]tabilizing is prohibited except for the

purpose of preventing or retarding a decline in the market price of a security." Rule 104(b), 17 C.F.R. 242.104(b).

As the SEC staff has explained, the purpose of Regulation M is "to protect the integrity of the offering process by precluding activities that could artificially influence the market for the offered security." Division of Market Regulation, U.S. Securities and Exchange Comm'n, Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases ¶ 2 (August 25, 2000) ("Bulletin 10").[8] To that end, "solicitations or other inducements by distribution participants during the distribution to generate purchases in the aftermarket are prohibited until the distribution is completed." *Id.*

In Bulletin 10, the SEC staff addressed "complaints that, while participating in a distribution of securities, underwriters and broker-dealers have solicited their customers to make additional purchases of the offered security after trading in the security begins," and that "some underwriters have required their customers to agree to buy additional shares in the aftermarket as a condition to being allocated shares in the distribution (*i.e.*, 'tie-in' agreements)." Bulletin 10 ¶ 1. Reiterating the SEC's consistent view, the staff explained:

> Tie-in agreements are a particularly egregious form of solicited transaction prohibited by Regulation M. As far back as 1961, the Commission . . . said that such agreements may violate the anti-manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

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[8] Attached as Addendum A to this memorandum.

> Solicitations and tie-in agreements for aftermarket purchases are manipulative because they undermine the integrity of the market as an independent pricing mechanism for the offered security. Solicitations for aftermarket purchases give purchasers in the offering the impression that there is a scarcity of the offered securities. This can stimulate demand and support the pricing of the offering. Moreover, traders in the aftermarket will not know that the aftermarket demand, which may appear to validate the offering price, has been stimulated by the distribution participants. Underwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss.

Id. ¶ 2 (footnotes omitted). Accordingly, the staff cautioned underwriters that "solicitations and tie-in agreements for aftermarket purchases before a distribution is completed are manipulative sales practices prohibited by Rules 101 and 102 of Regulation M, and may violate other anti-fraud and anti-manipulation provisions of the federal securities laws." *Id.* ¶ 3 (footnote omitted).

In this case, plaintiffs contend that they are challenging the kind of solicitation and tie-in agreements that were the subject of Bulletin 10, as well as other fraudulent and manipulative practices prohibited by the securities laws and SEC regulations. *See* Am. Complaint ¶¶ 4, 6, 7; Pfeiffer Complaint ¶ 84; Response at 25-32;[9] Pfeiffer Opp. at 5-6 and

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[9] "Response" refers to Plaintiffs' Corrected Response to Defendants' Motion To Dismiss the Federal Antitrust Claims (July 24, 2002).

n.5.[10] There can be no basis for a contention—and defendants do not argue—that the SEC has expressly or implicitly approved tie-in requirements or agreements to impose them.[11] *Compare Friedman*, slip op. 9-12 (SEC had made deliberate decision not to prohibit practices). Accordingly, because antitrust scrutiny of these allegations would not conflict with or be repugnant to the regulatory scheme, the complaints should not be dismissed on *implied immunity* grounds under Rule 12(b)(6).

The United States does not address whether the Amended Complaint and the Pfeiffer Complaint should be dismissed on *other* grounds under Rule 12(b)(6). If the complaints are not dismissed, of course, plaintiffs will have the burden of proving the alleged antitrust violations. It is unclear at this point what evidence they intend to adduce in support of their generalized assertions. The Amended Complaint alleges that "defendants continuously communicated and worked together as co-underwriters and members of underwriting syndicates," Am. Complaint ¶ 45, and that they "abused the

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[10] "Pfeiffer Opp." refers to the Memorandum on Behalf of Plaintiff Pfeiffer in Opposition to Defendants' Motion to Dismiss the Robinson-Patman Claim Under Section 2(c) (July 8, 2002).

[11] Although the SEC regulations do not specifically address *agreements* among underwriters to engage in prohibited solicitations and tie-ins for aftermarket purchases, the securities law prohibitions do not depend on whether such practices are implemented by individual underwriters, through a syndicate, or pursuant to an industry-wide agreement.

Section 5(c) of the 1933 Act, 15 U.S.C. 77e(c), also prohibits a sale or offer to sell securities unless a registration statement has been filed. *See* Loss and Seligman, *supra*, at 82-84. Alleged requirements that customers purchase stock in any IPO for which a registration statement has not yet been filed would violate this prohibition as well.

preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates," *id.* ¶ 5. Many of the factual allegations of the Amended Complaint as to the "making and implementation of defendants' unlawful agreement," *id.* ¶¶ 44-64, appear merely to describe accepted practices of syndicated underwriters that are approved by the SEC and would not violate the antitrust laws, *see United States v. Morgan*, 118 F.Supp. 621, 691 (S.D.N.Y. 1953); *Friedman v. Solomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000), *aff'd*, No. 01-7207 (2d Cir. Dec. 20, 2002).[12] Nonetheless, plaintiffs maintain that while "the [Amended] Complaint describes the 'syndicate system,'" it "does not challenge its propriety." Response at 3.

The United States expresses no view as to the merits of plaintiffs' antitrust complaints. Antitrust suits are not a proper vehicle for advancing complaints about violations of the securities laws under another label. To pursue an antitrust claim, plaintiffs are obliged to plead and prove that defendants' committed conduct meets the standards of the Sherman Act. We submit, however, that the complaints

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[12] Mere evidence that the defendants had an opportunity to conspire while engaging in legal activities will not meet plaintiffs' burden of proof at trial or defeat a defense motion for summary judgment. *See, e.g., United States v. Taubman*, 297 F.3d 161, 166 (2d Cir. 2002) (antitrust conspiracy may not be inferred from mere fact of meetings between persons engaged in competing businesses); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir. 1982) ("'mere showing of close relations or frequent meetings between the alleged conspirators'" would be "insufficient as a matter of law to warrant the inference of a conspiracy") (quoting *Oreck v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980)).

should not be dismissed on implied immunity grounds under Rule 12(b)(6) merely because regulated conduct is involved.

CONCLUSION

The Court should not dismiss the complaints on implied immunity grounds under Rule 12(b)(6).

Respectfully submitted.

R. HEWITT PATE
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December 20, 2002

Addendum A

Division of Market Regulation, U.S. Securities and Exchange Comm'n, Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases (August 25, 2000) ("Bulletin 10")

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[Certificate of Service omitted in printing]

APPENDIX F

United States Securities and
Exchange Commission
Washington, D.C. 20549

January 13, 2003

Honorable William H. Pauley, III
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007-1581

Re: *In re Initial Public Offering Antitrust Litigation*,
No. 01-CIV-2014

Dear Judge Pauley:

As the Court is aware, the Securities and Exchange Commission filed a memorandum *amicus curiae* in this case urging that the conduct alleged here is immune from antitrust challenge because of the Commission's regulatory authority over that conduct, particularly at a time when the Commission is actively addressing the conduct in a variety of ways. The Commission wishes to call the Court's attention to two recent Second Circuit decisions that support the Commission's legal arguments, and also to advise the Court of a recent enforcement action filed by the Commission to remedy conduct similar to some of that alleged in plaintiffs' complaint. Copies of both court of appeals decisions, as well as of a press release announcing the enforcement action, are attached.

1. *In re Stock Exchanges Options Trading Antitrust Litigation* In this case, as in the case now before the Court, plaintiffs challenged conduct that was prohibited by the current securities laws. *See* Comm. Mem. 3 n.2 (Commission presumes for sake of argument that plaintiffs have alleged and can prove at least some conduct that violates the securities laws). In *Options*, the conduct was an alleged agreement

among securities exchanges not to multiply list options. Like the conduct at issue in this case, the Commission had comprehensive regulatory authority over the conduct, and it had actively regulated it for many years. The issue was whether the antitrust laws could be applied to that conduct, given that the Commission had concluded that free-market competition rather than regulation should determine on which exchanges options traded, and it had therefore prohibited conduct like that alleged in the case. The court of appeals ruled that the antitrust laws did not apply because of the potential for conflict between those laws and the Commission's regulatory regime despite the fact that at this time both the securities laws and the antitrust laws prohibit the conduct.

The court of appeals's explanation of this holding bears directly on the issue before this court:

A. Antitrust immunity analysis "must focus on the 'potential' for '*conflicts* between the antitrust laws and a[n authorized] regulatory regime.'" *Quoting Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir.), *cert. denied* 474 U.S. 1006 (1985) (emphasis and brackets in original). Applying this principle to the conduct alleged in *Options*, the court of appeals concluded that "implied repeal is necessary to preserve the authority of the SEC to regulate that conduct." *Options* 22. Similarly, the Commission emphasized throughout its Memorandum the importance of guarding against potential conflicts between the antitrust laws and its regulatory regime, rather than narrowly focusing on whether some aspect of particular conduct is prohibited under current regulations.

B. The court of appeals emphasized that under the Exchange Act, the Commission is "concerned with more than just the protection of competition, which is the sole aim of antitrust legislation." *Options* 22 (internal quotation marks and citation omitted). In deciding whether to require or prohibit multiple listings, the Commission "has perforce

balanced the interest of promoting competition, on the one hand, against undesirable potential effects, on the other hand, such as market fragmentation, financial injury to regional exchanges, and deleterious structural changes in the markets." *Options* 23 (internal quotation marks and citations omitted). The Commission relied heavily on this consideration in its analysis. Comm. Mem. 4-7; 18-19.

C. As to the argument that no conflict was possible because current securities law prohibits the conduct, the court of appeals explained that this "contention misperceives the proper analytical focus. The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that *empowers the agency to allow conduct* that the antitrust laws would prohibit" *Options* 23 (emphasis added), *citing Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 690 (1975), *inter alia*. The Commission made the same point, both as to the governing principle, and as to the relevance of *Gordon*. Comm. Mem. 19-23.

D. In language that applies equally to this case as to the case before it, the court of appeals concluded that, "[i]n sum, the SEC has ample statutory authority, which it has repeatedly exercised, to regulate" the challenged conduct, so that even though the Commission's present stance is that the conduct is forbidden,

> the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. We see no way to reconcile *that SEC authority*, which may be exercised to permit [the conduct], with the antitrust laws.

Options 25 (emphasis added).

E. Finally, we note that the court of appeals analyzed the governing Supreme Court decisions in a manner quite similar to the way the Commission did.

(1) *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). The court of appeals read the Supreme Court's decision that the conduct challenged in this case was not immune as resting on two propositions: (1) "[b]ecause the SEC lacked the authority to regulate the conduct challenged * * * there was no potential for the antitrust laws to overlap or conflict with the regulatory power of the SEC;" and (2) "given the absence of SEC authority, there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable." *Options* 17. Neither of those propositions obtains in the case now before this Court, as the Commission has authority to regulate the conduct, and it will therefore determine whether the conduct is appropriate.

(2) *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). The court of appeals quoted many of the same passages from this decision as did the Commission's memorandum, and reads that decision, as did the Commission, as holding that even conduct prohibited under the current regulatory regime may be held immune in order to prevent potential conflicts. *Compare Options* 18-19, 23-24, *with* Comm. Mem. 19-23. As did the Commission, the court of appeals focused on the facts that the Commission must consider other factors than competition in deciding whether to permit or prohibit particular conduct, and that immunity was necessary to permit proper functioning of "the legislative provision for regulatory agency supervision" of the conduct, even if the conduct is prohibited under current regulations. *Options* 18-19.

(3) *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). As did the Commission, the court of appeals focused on the Supreme Court's handling of the immunity claims with respect to activities that were ancillary to conduct that the Commission had decided to permit. *Compare Options* 19-20 *with* Comm. Mem. 24-25. The Court held that these activities were immune because the

Commission pervasively regulated the field, it "had ample authority to eliminate them" if it found that they frustrated Commission regulatory objectives, and allowing antitrust liability would pose "a substantial danger" of duplicative and inconsistent standards.

* * *

2. *Friedman v. Salomon/Smith Barney, Inc.* This second decision differs from *Options* and from the case before this court because the alleged conduct at issue there was not contrary to current law. Nevertheless, the analytical framework employed by the court of appeals also strongly supports the conclusion that the conduct alleged in this case is immune from antitrust liability. Indeed, the court of appeals in *Options* quoted extensively from *Friedman*. *See Options* 21-23.

The issue in *Friedman* was whether antitrust immunity applied to certain alleged conduct by underwriters that was intended to stabilize the aftermarket price of newly offered securities. Slip Op. 3. The Commission urged, and the court of appeals agreed, that there should be immunity for this conduct because the Commission had regulatory authority over the conduct, it had long been aware that the conduct often occurred, and it had not prohibited the conduct. *See* Comm. Mem. at 32 n. 10; *Friedman* 9-13.

The following statements of general principles and interpretation of the relevant judicial decisions, however, are as applicable to conduct that is prohibited as to conduct that is permitted under the regulatory regime.

A. "Importantly, the 'plain repugnancy,' or conflict between antitrust and securities laws extends to *potential* as well as actual conflicts." *Friedman* 6 (emphasis added). The Commission's position is based substantially on the potential for conflicts between the policy judgments made by the regulatory regime and the antitrust laws, which is in large measure why it believes immunity should extend to some

forms of conduct that are prohibited under current law. Comm. Mem. 36-40.

B. "[I]mplied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of the regulatory action that allegedly conflicts with the antitrust laws." *Friedman* 6. We have also emphasized the importance of eschewing a broad-brush rule that conduct that is prohibited under current law cannot be immune, and have instead urged a careful focus on the nature of the particular regulatory provisions at issue. Comm. Mem. 6 n. 3.

C. "[I]mplied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that *the SEC should regulate the alleged anticompetitive conduct*. In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates." Slip Op. 9 (emphasis added). This is the Commission's position in a nutshell. Congress has determined that the Commission, not private antitrust plaintiffs, should regulate the challenged conduct, and it should be permitted to do so. Comm. Mem. 4-7.

D. As was true in *Options*, the court's reading of the key cases was in agreement with the Commission's analysis of those cases:

(1) The "key" to the decision in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), the court of appeals explained in *Friedman*, was "the absence of conflict or repugnancy between *the legal schemes*" and the fact that "there was no built-in balance under the Commodity Exchange Act that permitted 'a little price manipulation.'" *Friedman* 7 (emphasis added). In contrast, the court noted, the Exchange Act does permit a little manipulation in the form of stabilization, subject to the Commission's regulatory judgment. *Friedman* 7, *see also id.* 12. We made the same point about *Strobl*, and also observed that even outside the

realm of stabilization, the Exchange Act gives the Commission broad authority to permit, regulate or prohibit conduct that could be deemed manipulative. Comm. Mem. 26-32.

(2) The court of appeals noted that in *United States v. NASD*, 422 U.S. 694 (1975), the Supreme Court held that "'[t]here can be no reconciliation of [the SEC's] *authority* * * * to permit" the types of restrictive agreements among competitors that were challenged in that case "with the Sherman Act's declaration that they are illegal per se,' even though the SEC has not specifically approved the restrictive agreements." *Friedman* 7-8 (emphasis added). We analyzed *NASD* similarly as being a case about the scope of the Commission's pervasive regulatory authority. Comm. Mem. 24-25.

(3) The court of appeals also observed that in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), the Supreme Court found immunity based on the fact that the Commission "had jurisdiction to establish a system of fixed commission rates," and that the Supreme Court had not considered the wisdom of the policy adopted, but "only Congress's intent that *the SEC and not antitrust laws* address the issue." *Friedman* 8 (emphasis added). Again, the Commission supported the same reading of that case. Comm. Mem. 19-23.

(4) Finally, in its discussion of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the court of appeals focused on the fact that "nothing in the SEC regulatory regime at the time [of the decision] performed the 'antitrust function' of considering injuries to competition," but that Congress had since amended the Exchange Act "to require the SEC to take competition, among other things, into account in rulemaking and when reviewing rules of exchanges." *Friedman* 8. Recognition that the Commission has been selected by Congress to perform the "antitrust function" was also a key element of the Commission's argument. Comm. Mem. 18-19.

* * *

3. *SEC v. Robertson Stephens, Inc.*, Litigation Rel. No. 17923 (Jan. 9, 2003). The Commission announced that it had filed a civil action against the broker-dealer Robertson Stephens, Inc. relating to the firm's allocation of shares in initial public offerings. The Commission alleged that Robertson Stephens wrongfully obtained millions of dollars from over 100 customers by allocating shares of "hot" IPOs to these customers and receiving, in return, a share of the profits made by these customers in the IPO stock, which was paid to Robertson Stephens in the form of excessive commissions or markdowns.

Robertson Stephens agreed to settle the matter, without admitting or denying the allegations of the complaint. It consented to entry of a final judgment permanently enjoining it from future violations, and ordering it to pay $23 million in disgorgement, together with a civil penalty of $5 million. (The amount of disgorgement and penalty were reduced in recognition of Robertson Stephens payment of disgorgement and a penalty to the NASD in a related proceeding.)

This action emphasizes the point that the Commission is actively pursuing a variety of remedial steps in this area. It further points out the importance of not permitting private antitrust proceedings to potentially interfere with those efforts by possibly making different interpretations of the securities laws. *Cf.* Comm. Mem. 13-17, 32-33.

Respectfully submitted,

/s/

Marc Pennington
Assistant General Counsel
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cc: Christopher Lovell, Esq.
Russel H. Beatie, Esq.
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APPENDIX G

United States Securities and
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March 21, 2005

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Re: Response to Court's invitation to file letter brief in *Billing v. Credit Suisse First Boston*, Nos. 03-9284 and 03-9288 (2d Cir.).

Dear Ms. MacKechnie:

By letter of January 4, 2005, the Court invited the Securities and Exchange Commission to submit a letter brief to address three questions in the above-numbered cases.[1] The Commission responds to those questions as follows.

1. **Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices?**

The federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the

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[1] The Court's letter asks the Commission to respond on behalf of the United States. As an independent regulatory agency, the Commission is not authorized to respond on behalf of the United States.

complaints in these actions. The Commission does not now have pending before it, nor does it currently anticipate any proposals that would permit that sort of conduct. Indeed, as we discuss below, the Commission has brought several recent enforcement actions under its existing prohibitions and, as the Court notes, the Commission has also proposed amending Regulation M, 17 C.F.R. 240.100-105, to strengthen those prohibitions.

The Court has asked, however, whether the Commission would have the authority to permit the alleged conduct, including a conspiracy to inflate aftermarket securities prices. As the Commission explained in its Memorandum *amicus curiae* in the district court, it has broad authority over the registered securities offering process, including authority to permit at least some agreements among underwriters that can have the effect of increasing the aftermarket price over the price that would prevail in the absence of those agreements, and which therefore could be viewed as coming within the terms of the question raised by the Court. The Commission's authority rests not only on Section 9(a) of the Securities Exchange Act, the provision on which plaintiffs have focused, but on other provisions as well.[2] In addition, the Commission has oversight responsibility for the rules of self-regulatory organizations, which can also affect market prices and conditions.[3]

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[2] These include, *inter alia*, Sections 2(a)(3), 5, and 28 of the Securities Act, 15 U.S.C. 77b(a)(3) and e, as well as rules adopted under that Act, as well as Sections 10(b), 15(c), and 36 of the Exchange Act, and rules and regulations adopted under that Act. *See, generally*, Comm. Mem. At 8-11, 28-29.

[3] These include, *inter alia*, NASD Rules 2110, 2110-1, 2710. *See, generally*, Comm. Mem. 12-13. SRO rules may not be approved by the Commission unless the Commission determines that the rules "do not impose any burden on competition not (cont'd)

Thus, as this Court discussed in its decision in *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002), the Commission has permitted underwriters to enter into agreements that can have the effect of restricting the resale of newly offered securities in the days immediately following the onset of trading, a practice known as "flipping." Plaintiffs in that case alleged that defendant firms violated the antitrust laws by denying or restricting stock allocations or commissions to brokers whose retail customers engage in flipping. The Court acknowledged that "flipping causes stock prices to fluctuate—usually downward—and aftermarket sales restrictions are a form of price stabilization." 313 F.3d at 797. Despite the fact that the challenged restrictions could have an upward effect on aftermarket prices, the Court agreed with the Commission's view that agreements among underwriters to impose them were immune from antitrust challenge because the antitrust laws conflicted with the regulatory provisions of the federal securities laws.

In short, the Commission has the authority to allow aftermarket conduct by underwriters conducting registered offerings, including IPOs, that may have the effect of maintaining aftermarket prices at a level higher than would be realized in a market subject to no regulation other than the antitrust laws. That result is inherent in a regulatory system such as the one established by the federal securities laws, which requires the Commission to weigh in the balance other important public interest considerations in addition to concerns about competition. While the Commission can and has approved conduct that affects aftermarket prices

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(... cont'd)

necessary or appropriate in furtherance of the purposes of" the Exchange Act. *See* Sections 6(b)(8) and 15A(b)(9) of the Exchange Act.

following registered offerings, it can do so only where it is persuaded by substantial evidence that the conduct will have other important beneficial effects on the functioning of the securities markets. The Commission may authorize conduct that has anti-competitive effects if the Commission concludes that countervailing benefits demonstrate that such action is necessary or appropriate in the public interest or for the protection of investors.

The precise scope of the Commission's authority to adopt rules or to grant exemptions in this area is difficult to delineate in the abstract because it is impossible to foresee what future developments in the offering process or the Commission's understanding of the public interest and investor protection may require, a difficulty that the district court discussed at the argument in this case. JA 1129-30. Current precedent does not, however, foreclose the Commission's ability in response to future developments to authorize conduct by underwriters that could be characterized as a tie-in or laddering. For example, while it is difficult to envision the circumstances under which the Commission would do so, the Commission could approve an SRO rule that permitted such conduct, assuming the statutory requirements under the Exchange Act were met, including the requirements that the rule be designed to protect investors and the public interest, and that it not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. (As noted above, that conduct, at present, is prohibited, and the Commission is not contemplating that it should be permitted.)

2. If not, how—if at all—could judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions?

The Court's second question requires a response only if the Commission concludes it does not have the authority to permit the conduct alleged in the complaint. Nevertheless, it

may be useful to outline why, in the Commission's view, analysis of the question of implied repeal may entail consideration of issues beyond an assessment of the outer limits of the agency's authority to permit particular conduct. As this Court has recognized, "antitrust immunity is not to be presumed from the mere existence of overlapping authority." *In re: Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 148 (2d Cir. 2003). In this case, however, we believe that antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime established by Congress, even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs.

The foundation of the Commission's position, as explained at greater length in its Memorandum, is that syndicate underwriting of public offerings inherently involves agreements and joint actions among potential competitors, including agreements about price, that, but for the securities regulatory regime, would raise substantial antitrust concern. The Commission, and the NASD subject to Commission oversight, comprehensively and actively regulate the offering process under a set of rules and regulations that have evolved through time to adjust to changes in the market and to regulatory understanding of what is necessary or appropriate in the public interest and for the protection of investors. Under this regulatory regime, competition is one factor that must be weighed in the balance, but it is not necessarily given the predominant weight, nor is the Commission required to adopt the least anti-competitive alternative. *See Bradford National Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978).

While the Supreme Court has observed that intent to repeal the antitrust laws is "much *clearer* when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge," *National Gerimedical*

Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388-89 (1981) (emphasis added, citations omitted), that is not the only circumstance under which immunity is appropriate. Rather, the ultimate issue is whether permitting antitrust liability is clearly repugnant to the "regulatory *system*." *Id.*, 452 U.S. at 389 (emphasis added). As the Supreme Court phrased the issue in *Gordon v. NYSE*, 422 U.S. 659, 688 (1975), the question is "whether allowance of an antitrust suit would conflict with the operation *of the regulatory scheme* which specifically authorizes the SEC to oversee" the conduct that is the basis of the antitrust claim (emphasis added). Thus, the Court explained that the issue was not whether the fixed-commission system challenged in that case was necessary to the operation of the exchanges, but whether immunity should be implied "in order to permit the Exchange Act to function as envisioned by Congress." 422 U.S. at 688; *see also United States v. NASD*, 422 U.S. 694, 730, 734 (1975) (upholding immunity in light of Commission's actively exercised oversight authority under the securities laws); *In re: Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 148-50 (2d Cir. 2003) (same). *See Silver v. NYSE*, 373 U.S. 341, 358 (1963) (no immunity found when there was nothing "built into the regulatory scheme which performs the antitrust function of insuring that" regulated entities will not unjustifiably limit competition).

The Exchange Act charges the Commission with broad regulatory authority to oversee the underwriting of registered offerings. While tie-ins and laddering are prohibited by the existing regulatory regime, other cases could involve conduct presenting closer questions. Underwriters and other participants in the underwriting process should not be subjected to the fear that in interpreting and applying the comprehensive governing body of securities laws rules, they could find themselves not only liable for violating the securities laws, but also in an antitrust treble damages action. By discouraging useful interactions among participants in the

offering process that are permitted under the securities laws, the fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process. In other words, absent a holding of immunity in this case, rather than being one factor to be weighed by the Commission along with other investor protection factors, antitrust concerns will become the predominant considerations in the underwriting process. Nor should the Commission's ability to interpret, apply, and revise the governing law be displaced by introduction of the antitrust laws as an alternative, potentially competing regulatory scheme.

Not only is the Commission's authority here comprehensive; the Commission has been actively exercising that authority, both in the rulemaking and in the enforcement areas. We advised the district court (Comm. Mem. 13-17) of specific steps being taken by the Commission to investigate the alleged misconduct that forms the basis for this case, and to remedy any violations that it found. Since December 2002, when we filed that Memorandum, the Commission has continued its activities.

On May 29, 2003, the NYSE/NASD IPO Advisory Committee, formed in October 2002 at the request of the Commission's then-Chairman, issued its final report and recommendations, which address the problems evidenced during the hot IPO market of the late 1990s and 2000. *See NYSE/NASD IPO Advisory Committee, Report and Recommendations* (May 2003).

As the Court notes in its letter to us, on October 13, 2004, the Commission proposed amendments to Regulation M (the anti-manipulation rule governing securities offerings). The proposed amendments are intended to prohibit certain activities by underwriters and other distribution participants that can undermine the integrity and fairness of the offering process, particularly with respect to allocations of offered securities. Among other things, the proposed amendments

would add a new Rule 106 to expressly prohibit distribution participants, issuers, and their affiliated purchasers, directly or indirectly, from demanding, soliciting, attempting to induce, or accepting from their customers any consideration in addition to the stated offering price of the security. *See* Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004).

On December 20, 2004, the Commission published for comment proposed rule changes by the NASD and NYSE arising from recommendations of the IPO Advisory Committee regarding the allocation and distribution of IPOs. *See* "Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc. Relating to the Prohibition of Certain Abuses in the Allocation and Distribution of Shares in Initial Public Offerings," Securities Exchange Act Release No. 50896 (December 20, 2004), 69 FR 77804 (December 28, 2004) [SR-NYSE-2004-12 and SR-NASD-2003-140]. The SRO proposed rule changes include proposals regarding, among other things, *quid pro quo* allocations, "spinning," and penalty bids.

These proposals, like the enforcement proceedings and other steps discussed below, reflect the Commission's comprehensive authority to regulate the underwriting process, and its continued active exercise of that authority. They are additional evidence that Commission regulation of the offering process during the last seventy years has involved a continual adjustment of previous rules to newly emerging or identified problems, balancing and re-balancing relevant factors to protect investors and the public interest. The Commission should be free to revise the applicable regulations to meet new issues as they emerge, giving competitive concerns their due weight under the statutory scheme. *See* Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

Further, the Commission has recently completed three enforcement injunctive actions involving underwriters' violations of Regulation M. The Commission's complaints allege that the underwriters attempted to induce customers who received IPO allocations to place purchase orders for additional shares in the aftermarket. *See Morgan Stanley & Co. Incorporated*, Lit. Rel. 19050 (January 25, 2005); *Goldman Sachs & Co.*, Lit. Rel. 19051 (January 25, 2005); *J.P. Morgan Securities Inc.*, Lit. Rel. 18385 (October 1, 2003) (Commission Litigation Releases are available at SEC.gov/litigation). The Commission also brought an injunctive action alleging that an underwriter violated the federal securities laws and NASD rules by allocating shares of "hot" IPOs to customers and receiving, in return, profits—in the form of excessive commissions or markdowns—made by these customers on their FPO stock. *See Robertson Stephens, Inc.*, Lit. Rel. 17923 (January 9, 2003).

In addition, private class actions *under the securities laws* are proceeding in the district court. *See In re Initial Public Offering Securities Litigation*, 2005 U.S. Dist. LEXIS 2121 (S.D.N.Y. February 15, 2005); *In re Initial Public Offering Securities Litigation*, 241 F. Supp.2d 281 (S.D.N.Y. 2003).

These steps are the appropriate responses to any alleged securities law violations. They should not be effectively supplanted by an antitrust action which does not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance.

Finally, we note another possible harmful effect of allowing these actions to proceed. While our response has focused to this point on alleged conduct that the Commission does not allow, the complaint in this case goes further. Plaintiffs' antitrust claims combine "allegations" that defendants engaged in collective conduct *permitted* under the securities regulatory regime (Comm. Mem. 34-36) with

conclusory allegations that in the course of doing so they engaged in impermissible anti-competitive conduct. If this action is permitted to go forward, it could force participants in the securities markets to focus not on complying with the securities laws, but predominantly on avoiding antitrust liability. Thus, as we noted in the district court (Comm. Mem. at 38), one of the claims raised by plaintiffs is that defendants failed to make certain prospectus disclosure, which defendants argue is not required by the applicable Commission regulation and NASD rules. The Commission has not had occasion to address this particular disclosure issue, yet plaintiffs now ask this Court to interpret those provisions as part of the determination of whether defendants violated the antitrust laws, to lift the antitrust immunity if defendants' interpretation is incorrect, and to hold defendants liable for treble damages. The *in terrorem* effect of that sort of liability could distort market participant behavior in ways that are harmful to the overall securities markets. The issue should be addressed under the securities laws, not the antitrust laws.

3. In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?

Based on how judgment for the plaintiffs could impede the Commission's ability to regulate underwriting in registered offerings, as explained in the preceding discussion, we believe that the defendants in this case are entitled to antitrust immunity. We emphasize that a different analysis, and a different result, might be required with respect to conduct that, unlike underwriting in registered offerings, has not been subject to comprehensive and active Commission oversight and regulation.

Enclosed please find three copies of this letter for distribution to the panel considering this case. If you have any questions, please call Mark Pennington, Assistant General Counsel, at 202-942-0928.

Respectfully submitted,

/s/
Giovanni P. Prezioso
General Counsel

Cc: (by fax and overnight delivery):
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(by fax and messenger)
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APPENDIX H

DEPARTMENT OF JUSTICE
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May 5, 2005

Roseann B. MacKechnie, Esq.
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Re: *Billing v. Credit Suisse First Boston*, Nos. 03-9284 and 03-9288 (2d Cir.)—Response of the United States to the Court's Request for Views on the Issue of Implied Antitrust Immunity

Dear Ms. MacKechnie:

This letter brief responds to your March 25, 2005, letter inviting the United States to address the Court's questions on the issue of implied antitrust immunity, questions on which the Securities and Exchange Commission provided its views on March 21, 2005. The United States believes that the Court will find the Commission's detailed description of its authority and regulatory activity in this area helpful. The

United States' view of the case law and legal principles applicable to the conduct at issue, however, is somewhat different from the Commission's, and we reach a somewhat different conclusion on the issue of implied immunity.[1]

(1) Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities price?

As the Commission's letter explains in some detail, "[t]he federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaints in these actions." SEC Letter at 1.[2] Not surprisingly, "[t]he

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[1] The United States has primary responsibility for enforcing the federal antitrust laws, which express the Nation's fundamental economic policy in favor of free competition. As reflected in its letter brief submitted at the Court's request, the SEC reached a different conclusion than we do on some aspects of the questions raised by the Court. We reviewed the Commission's letter brief before it was filed, but that brief (unlike this brief for the United States) was not approved by the Acting Solicitor General and does not state the views of the United States.

[2] The Commission's enabling statutes include section 17 of the Securities Act of 1933, 15 U.S.C. § 77q, and section 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i. Sections 9(a)(1) through 9(a)(5), 15 U.S.C. §§ 78i(a)(1)-(5), expressly prohibit certain forms of price manipulation. Other forms of manipulation may be regulated or prohibited by the Commission under section 9(a)(6), 15 U.S.C. § 78i(a)(6) (*see Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 793-94 (2d Cir. 1969); *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719 at *6 (S.D.N.Y. 2000), *aff'd*, 313 F.3d 796 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003)), as well as under section15(c) of the Exchange Act, 15 U.S.C. § 78o(c). The Commission also has exemption powers (cont'd)

Commission does not now have pending before it, nor does it currently anticipate any proposals that would permit that sort of conduct." SEC Letter at 1. The Commission has emphasized that it brings enforcement actions against such practices and that it has proposed amending SEC Regulation M, 17 C.F.R. § 240.100-105 (the anti-manipulation rule governing securities offerings) to strengthen the existing prohibitions. *See* SEC Letter at 1-2, 4-6.

The SEC noted that "[t]he precise scope of the Commission's authority to adopt rules or to grant exemptions in [the IPO] area is difficult to delineate in the abstract." *Id.* at 3. The United States also views the question posed by the Court as extremely difficult to answer in the abstract; such questions would normally be answered in a specific context on the basis of a detailed agency record. There is no dispute, however, that the securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to the proper functioning of the securities markets. Thus, we find it very difficult to imagine circumstances in which the statutory prerequisites to waiver identified by the SEC in its letter brief at 2-3) could ever be satisfied for tying and laddering. In any event, the critical—and undisputed—fact for purposes of this case is that the Commission has never authorized tying and laddering, nor has it ever considered doing so. Accordingly, the United States believes there is no demonstrated "potential for regulatory permission of the conduct at issue." *In re Stock*

(... cont'd)

under section 28 of the Securities Act, 15 U.S.C. § 77z-3, and section 36 of the Exchange Act, 15 U.S.C. § 78mm, and oversight responsibility for securities industry self-regulatory organizations, that the Commission has suggested might be relevant to the questions posed by the Court. *See* SEC Letter at 2 nn.2-3.

Exchanges Options Trading Antitrust Litigation, 317 F.3d 134, 148 (2d Cir. 2003) ("*Options*") (discussing *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27-28 (2d Cir. 1985)).

(2) If not, how—if at all—could judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions?

This question, the United States submits, must be considered in light of the relevant legal principles and the particular practices challenged in the complaint. Because "[t]he antitrust laws represent a fundamental national economic policy," "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system." *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (emphasis added; internal quotation marks and citations omitted); *accord, Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975); *Options*, 317 F.3d at 148. The "proper approach" to immunity questions requires "reconcil[ing] the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Antitrust immunity cannot "be presumed from the mere existence of overlapping authority." *Options*, 317 F.3d at 148. And even where conflicts between the antitrust laws and the regulatory scheme warrant immunity as to some allegations of a complaint, the "baseline principle" is that repeal of the antitrust laws is implied "'only if necessary to make the [regulatory law] work'" and "'even then only to the minimum extent necessary.'" *Id.* at 145 (quoting *Silver*). While this Court in *Options* held that the history of regulatory approval was sufficient to create immunity, even

with respect to conduct currently prohibited by regulation,[3] that holding does not depart from the well-established rule that the mere existence of overlapping regulatory authority does *not* suffice to create immunity. *Id.* at 148. *Options* involved practices that the SEC had in the past authorized, and the Court noted that the Commission might choose to again permit those practices in the future. In that circumstance, the Court found conflict arising from "an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Id.* at 149.[4]

Absent a demonstrated potential for conflict, however, it is presumed that Congress intended that both the regulatory scheme and the antitrust laws apply. Accordingly, what is required is a "fairly fact-specific inquiry," *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.2d 796, 799 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003), focused on the allegations of the particular case, to determine whether there is a conflict or potential for "'*conflicts* between the antitrust laws and a[n authorized] regulatory scheme,'" arising from express or implicit approval or from the "potential for regulatory permission of the conduct at issue." *Options*, 317

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[3] The United States filed amicus briefs in *Options* arguing that implied immunity should be limited to conduct that was expressly or implicitly approved or permitted under the regulatory scheme at the time it occurred. The *Options* panel took a broader view; this Court denied rehearing en banc. Although the United States disagrees with the result in *Options*, we recognize that it is binding on the panel in this case.

[4] *See also Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975) (implied immunity found for past commission fixing that was authorized under the regulatory scheme when it occurred, where Congress had "explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates").

F.3d at 148 (quoting *Strobl*, 768 F.2d at 27 (alteration in *Options*)).

In this case, the district court correctly held that the doctrine of implied immunity bars antitrust challenges to syndication and related practices expressly or implicitly approved by the SEC under the securities laws. *See In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 506-10 (S.D.N.Y. 2003) ("*IPO*"). As to those practices, there is conflict, and an antitrust judgment would impede the SEC's exercise of its regulatory authority. But the complaints also include challenges to alleged laddering and tie-in agreements that, as the Commission's response to the Court's questions confirms, the Exchange Act proscribes and the SEC recognizes as clear violations of the securities laws that it has never approved or even considered approving. Thus, the United States believes there is no demonstrated "potential for regulatory permission" of those practices, *Options*, 317 F.3d at 148, and, therefore, sees no proper basis for finding a conflict. In these circumstances, enforcement of the antitrust laws as to the laddering and tying allegations does not interfere with the SEC's ability to regulate or exempt from regulation. The district court's holding that the SEC's "sweeping power to regulate" was sufficient to create a potential conflict with the antitrust laws, *IPO*, 287 F. Supp. at 506, amounts to an impermissible finding of antitrust immunity based on "the mere existence of overlapping authority," *Options*, 317 F.3d at 148.

Viewed in the context of the relevant case law, the SEC's active efforts to enforce the regulatory prohibitions neither conflict with nor relieve defendants of their obligations to comply with the federal antitrust laws. In our view, the antitrust laws create no impediment to the SEC's ability to regulate and to enforce the securities laws with respect to the proscribed conduct, and implied immunity for laddering and tying would be particularly inappropriate because it is difficult to imagine any scenario in which the prerequisites

for an exemption to the consistent securities law prohibitions on such conduct could ever be satisfied.[5] Indeed the United States is concerned that the district court's overly expansive

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[5] Congress plainly did not reserve to the SEC the sole right to challenge conduct subject to SEC regulation. A conclusion that the federal antitrust laws are impliedly repealed would not insulate the conduct from private actions under the securities laws, for example. Moreover, a variety of state law remedies might be available. *See, e.g., CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (federal securities laws do not generally displace state securities laws). Indeed, although the district court below dismissed state antitrust claims, *IPO*, 287 F.Supp. 2d at 524; Special App. 65-71, it failed to justify that result under the preemption standards set forth by the Supreme Court. In *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989), the Court explained that state laws will be preempted only by (a) an express statutory preemption provision; (b) a showing that it is "'clear and manifest'" that "Congress intends that federal law occupy a given field"; or (c) a showing that state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted). Moreover, Congress included in the securities laws a savings provision, mandating that, with the narrow exception of certain state class actions, "the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Exchange Act § 28(a), 15 U.S.C. § 78bb(a) (similar savings clause). There is no reason to believe that Congress intended to immunize conduct prohibited by the securities laws from scrutiny under the federal antitrust laws, which "represent a fundamental national economic policy," *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quotations and citations omitted), while leaving that same conduct subject to challenge under state antitrust and other laws.

view of implied immunity, if accepted, could impede even joint efforts, like those the Commission and the Department of Justice have successfully undertaken in the past, to protect competition and consumers in the nation's vitally important financial markets by enforcing the securities laws *and* the antitrust laws.[6]

(3) In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?

The United States submits that, under established principles, the district court erred in dismissing the complaints in their entirety under Rule 12(b)(6) on the basis

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[6] *See e.g.*, SEC, "SEC and Department of Justice Sanction Four Options Exchanges for Anticompetitive Conduct," Press Release No. 2000-126 (Sept. 11, 2000) (www.sec.gov/news/press/2000-126.txt); U.S. Dept. of Justice, "Justice Department Files Suit Challenging Anticompetitive Agreement Among Options Exchanges," Press Release No. 00-530 (Sept. 11, 2000) (www.usdoj.gov/atr/public/press_releases/2000/6452.htm); Complaint (filed Sept. 11, 2000), and Stipulated Final Judgment (filed Dec. 6, 2000), *United States v. American Stock Exchange, LLC* (D.D.C. No. 00-2174 (www.usdoj.gov/atr/cases/f6400/6468.htm; www.usdoj.gov/atr/cases/f201200/201201.htm); Competitive Impact Statement, *United States v. Alex Brown & Sons, Inc.*, No. 96-5313 (S.D.N.Y. filed July 17, 1996) (www.usdoj.gov/atr/cases/f0700/0739.htm) (DOJ and SEC collaborated in evidence collection for simultaneous investigation of Nasdaq securities trading); Competitive Impact Statement, *United States v. Steinhardt Management Co.*, No. 94-9044 (www.usdoj.gov/atr/cases/f0800/0819.htm) (S.D.N.Y. filed Dec. 16, 1994) (DOJ and SEC reached global settlement under antitrust and securities laws regarding conspiracy to restrain trading in certain Treasury notes).

of implied immunity.[7] We conclude that defendants-appellees are entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations. Under the holding in *Options*, immunity may also extend to conduct where there is a demonstrated "potential for regulatory permission," 317 F.3d at 148.[8] But the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds.

Three copies of this letter are enclosed for distribution to the panel considering this case. If you have any questions, please call Catherine G. O'Sullivan, Chief, Appellate Section, Antitrust Division, United States Department of Justice, at 202-514-1531.

Respectfully submitted,

/s/
R. Hewitt Pate
Assistant Attorney General

Cc: Christopher Lovell, Esq., lead counsel for plaintiffs
Robert B. McCaw, Esq., lead counsel for defendants
Giovanni P. Prezioso, General Counsel, SEC

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[7] The United States expresses no view as to the merits of plaintiffs' antitrust complaints.

[8] As noted above, *see supra* note 3, the United States disagrees with the result in *Options*, but we recognize that it is binding on the panel in this case.

APPENDIX I

STATUTES AND REGULATORY GUIDANCE

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 13(c)

§ 13. Discrimination in price, services, or facilities

(c) Payment or acceptance of commission, brokerage or other compensation. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 77b(b)

§ 77b. Definitions

(b) Consideration of promotion of efficiency, competition, and capital formation. Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

15 U.S.C. § 77k

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable. In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made

by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement, in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without the proof of the reading of the registration statement by such person.

* * * * *

(e) Measure of damages; undertaking for payment of costs. The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the

depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. * * *

15 U.S.C. § 78i(a)

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security. It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial owner thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange or in connection with any security-based

swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer or broker, or the person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to make, regarding any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, for the purpose of inducing the purchase or sale of such security or such security-based swap agreement, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for

sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase of any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * *

15 U.S.C. § 78o-3(b)(9)

§ 78o-3. Registered securities associations

(b) Determinations by Commission requisite to registration of applicant as national securities association. An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

15 U.S.C. § 78w(a)

§ 78w. Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure.

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 3(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 3(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this title, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this title.

70 Fed. Reg. 19672 (Apr. 13, 2005)

SECURITIES AND EXCHANGE COMMISSION

Release Nos. 33-8565; 34-51500; IC-26828;
File No. S7-03-05

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations

Effective Date: April 7, 2005

EXECUTIVE SUMMARY: The purpose of this release is to provide guidance under Regulation M with respect to the process known as book-building, including the process for allocating shares in initial public offerings ("IPOs"). The Commission recently brought three enforcement cases alleging abuses in the offering process in contravention of Regulation M. Based on these cases, the Commission seeks to highlight certain prohibited activities that underwriters should avoid during restricted periods. These include:

- Inducements to purchase in the form of tie-in agreements or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.
- Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.
- Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.
- Proposing aftermarket prices to customers or encouraging customers who provide aftermarket

interest to increase the prices that they are willing to place orders in the immediate aftermarket.

- Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.
- Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.
- Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.

SUPPLEMENTARY INFORMATION

I. Introduction

Solicitations or other attempts to induce aftermarket bids or purchases during a distribution undermine the integrity of the market as an independent pricing mechanism for the offered securities by giving purchasers the impression that there is a scarcity of the offered securities. This improper conduct by underwriters of IPOs erodes investor confidence in the capital raising process. In recognition of the serious adverse impact of these activities, the Commission has adopted rules, most recently embodied in Regulation M, which prohibit these activities as a prophylactic matter.[1]

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[1] Regulation M (17 CFR 242.100-105) generally prohibits inducements of any transactions other than those necessary to conduct the offering. In the context of IPOs, the prohibition is (cont'd)

Attempts to induce aftermarket bids or purchases during a Regulation M restricted period, or a cooling-off period as it was known under its predecessor, Rule 10b-6, have always been prohibited under these rules.[2] We first provided guidance under Rule 10b-6 concerning abusive practices in connection with IPO allocations in 1961.[3] In 2000, the Division of Market Regulation staff reminded underwriters that restricted period solicitations and tie-in agreements for aftermarket purchases are prohibited conduct under Regulation M.[4] Recent enforcement actions suggest that during the hot IPO market of the late 1990s and 2000, some underwriters and other market participants failed to comply

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generally discussed in terms of the "aftermarket," *i.e.*, trading after the distribution period is over. Regulation M is the successor to former Rules 10b-6, 10b-6A, 10b-7, 10b-8, and 10b-21, and includes the basic prohibitions of those rules. *See* Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (Regulation M Adopting Release). Recently, the Commission published for comment proposed amendments to Regulation M. Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004) (Regulation M Proposing Release). *See infra* notes 6 and 11.

[2] Regulation M defines the term restricted period in Rule 100(b) (17 CFR 242.100(b)). *See infra* note 11.

[3] Securities Exchange Act Release No. 6536 (April 24, 1961) (stating that practice of distribution participants of IPOs making "allotments to their customers only if such customers agree to make comparable purchases in the open market after the issue is initially sold" violated Rule 10b-6).

[4] Staff Legal Bulletin No. 10, "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," August 25, 2000

with Regulation M or previous guidance.[5] As a result, we find it appropriate to remind distribution participants and their affiliated purchasers that attempting to induce aftermarket bids or purchases during a restricted period violates Regulation M. Such guidance is necessary at this time to forestall improper conduct while continuing to promote legitimate underwriting practices that will facilitate capital formation.

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III. Regulation M and IPOs

A. "Hot" IPO Periods

In the context of an IPO, Regulation M's prohibition on attempts to induce bids and purchases focuses on impermissible conduct during the restricted period that could stimulate others to engage in transactions when the trading market in the newly issued securities first commences (*i.e.*, the "aftermarket"). "Hot" IPO markets present special problems in this context.[18] By definition, hot IPO markets are

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[5] *See SEC v. J.P. Morgan Securities, Inc.*, No. 1:03CV02028 (ESH) (Complaint) (October 1, 2003). *See also SEC v. Goldman Sachs Group, Inc.*, No. 05 SV 853 (SAS) (Complaint) (January 25, 2005); *SEC v. Morgan Stanley & Co., Inc.*, No. 1:05 CV 00166 (HHK) (Complaint) (January 25, 2005). In "hot" IPOs, investor demand significantly exceeds the supply of securities in the offering and the stock trades at a premium in the immediate aftermarket. See NYSE/NASD IPO Advisory Committee, Report and Recommendations (http://www.nasdr/com/pdf-text/ipo_report.pdf) (May 2003) (IPO Advisory Committee Report).

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[18] *See* IPO Advisory Committee Report at 1-2, stating:

> In recent years, however, public confidence in the integrity of the IPO process has eroded significantly. Investigations have revealed that certain underwriters and other participants in

(cont'd)

characterized by high levels of demand for an allocation of the IPO shares in the original distribution, and therefore the shares are a valuable commodity. Underwriters may therefore be tempted to demand, require, solicit, encourage, or otherwise attempt to induce investors to engage in immediate aftermarket transactions in order to obtain an allocation of IPO shares.[19] Such activity violates Regulation M and also may violate the general antifraud and anti-manipulation provisions of the securities laws.[20]

The Special Study in 1963 that focused on the "hot issue" market from 1959-1961[21] found that "[i]n the pricing of new issues, underwriters could not help but be influenced by the knowledge that the prices of many issues would subsequently rise in the immediate after-market . . . ."[22] The Special Study identified a number of problems and abuses that resulted

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> IPOs at times engaged in misconduct contrary to the best interests of investors and our markets . . . Instances of this behavior became more frequent during the IPO "bubble" of the late 1990s and 2000. . . .

[19] *See* IPO Advisory Committee Report at 1 (discussing underwriters' misconduct during the IPO "bubble" of the late 1990s and 2000).

[20] "Any transaction or any series of transactions, whether or not effected pursuant to the provisions of Regulation M . . . remain subject to the antifraud and antimanipulation provisions of the securities laws. . . ." 17 CFR 242.100(a).

[21] Special Study, pt. 1.

[22] Special Study, pt. 1, at 554. *See also* IPO Advisory Committee Report, similarly noting that during the late 1990s and 2000, the "large first-day price increases affected the allocation process by creating a pool of instant profits for underwriters to distribute." *Id.* at 1.

from this knowledge, including the solicitation of aftermarket purchases.[23] The Special Study found that, while it was often difficult to determine whether solicitation of purchases in the aftermarket occurred prior to or immediately following the effective date of the offering, customers of certain distribution participants engaged in significant market purchases on the first day of trading, thus suggesting that the participants actively solicited or recommended purchases at least as early as the notice of effectiveness.[24]

Subsequent studies also discussed underwriters' conduct in connection with IPOs.[25] We issued a report in 1984 analyzing the hot issue market from 1980-1983.[26] Among other things, the 1984 Report found that underwriters used "tie-in" arrangements requiring customers, as a condition of participation in a hot issue offering, either to agree to purchase additional shares of the same issue at a later time, or to participate in another offering.[27] Most recently, the

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[23] Special Study, pt. 1, at 520-21, 556. *See supra* note 14.

[24] Special Study, pt. 1, at 556 (also finding that "[t]o add to the aftermarket excitement, some managing underwriters arranged for solicitation of customers at premium prices through nonparticipating firms.") *See also* David Clurman, *Controlling a Hot Issue Market*, 56 Cornell L. Rev. 74, 76 (1970).

[25] *See, e.g.*, IPO Advisory Committee Report.

[26] "Report of the Securities and Exchange Commission Concerning Hot Issues Markets" (August 1984) (1984 Hot Issues Report).

[27] 1984 Hot Issues Report, at 37-39. "This practice stimulates demand for a hot issue in the aftermarket thereby facilitating the process by which stock prices rise to a premium." *Id.* at 37-38. We have stated that "making allotments to customers only if such customers agree to make some comparable purchase in the open market after the issue is initially sold" may violate the anti-manipulative provisions of the Securities Exchange Act of 1934 (Exchange Act), particularly Rule 10b-6 (which was replaced by (cont'd)

NYSE/NASD IPO Advisory Committee issued a report in May 2003 discussing underwriters' conduct during the IPO "bubble" of the late 1990s and 2000, a period in which there were an unusually large number of IPOs that traded "at extraordinary and immediate aftermarket premiums."[28] The report found that among the most harmful practices that artificially inflated aftermarket prices were "allocating IPO shares based on a potential investor's commitment to purchase additional shares in the aftermarket at specified prices," which the report referred to as "laddering."[29]

B. Book-Building

Book-building refers to the process by which underwriters gather and assess potential investor demand for an offering of securities and seek information important to their determination as to the size and pricing of an issue.[30] When used, the IPO book-building process begins with the filing of a registration statement with an initial estimated

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(... cont'd)

Rules 101 and 102 of Regulation M), and may violate other provisions of the federal securities laws. Securities Exchange Act Release No. 6536 (April 24, 1961).

[28] IPO Advisory Committee Report, at 1.

[29] IPO Advisory Committee Report, at 2. The Report described "laddering" as inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, escalating prices in exchange for receiving IPO allocations, and stating that "[t]his conduct distorts the offering and the aftermarket and impairs investor confidence in the IPO process." *Id.* at 6.

[30] *See In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 388 n. 106 (S.D.N.Y. 2003) (book-building "entails the lead underwriter gathering and assessing potential investors' demand for the offering").

price range. Underwriters and the issuer then conduct "road shows" to market the offering to potential investors, generally institutions. The road shows provide investors, the issuer, and underwriters the opportunity to gather important information from each other. Investors seek information about a company, its management and its prospects, and underwriters seek information from investors that will assist them in determining particular investors' interest in the company, assessing demand for the offering, and improving pricing accuracy for the offering. Investors' demand for an offering necessarily depends on the value they place, and the value they expect the market to place, on the stock, both initially and in the future. In conjunction with the road shows, there are discussions between the underwriter's sales representatives and prospective investors to obtain investors' views about the issuer and the offered securities, and to obtain indications of the investors' interest in purchasing quantities of the underwritten securities in the offering at particular prices.[31] As the IPO Advisory Committee Report stated: "[C]ollecting information about investors' long-term interest in, and valuation of, a prospective issuer is an essential part of the book-building process."[32] By aggregating information obtained during this period from investors with other information, the underwriters and the issuer will agree on the size and pricing of the offering, and the underwriters will decide how to allocate the IPO shares to purchasers.[33]

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[31] *See* IPO Advisory Committee Report, at 5-6. Actual sales or contracts for sale are prohibited during the period prior to the registration statement for the offering becoming effective. 15 U.S.C. 77e.

[32] IPO Advisory Committee Report, at 6.

[33] *See* IPO Advisory Committee Report, at 4 (stating "[t]he pricing of an IPO is a business decision reached by the issuer in consultation with the underwriter"). *See also* Jay R. Ritter, *Initial*

(cont'd)

Information that underwriters typically attempt to gather from prospective investors during the book-building process for an IPO, whether in high demand or not, includes:[34]

- A customer's evaluation of the issuer's products, earnings, history, management, and prospects.
- A customer's valuation of the securities being offered.
- The amount of shares a customer seeks to purchase *in the offering* at particular price levels (*i.e.*, indications of interest or conditional offers to buy).
- Whether the customer owns similar securities in his portfolio.
- At what prices the customer expects the shares will trade after the offering is completed (*e.g.*, where the stock will be trading three to six months after the offering).
- Whether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as "flipping").
- The customer's desired long-term future position in the security being offered or in the relevant industry, and the price or prices at which the customer might accumulate that position.

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Public Offerings, Contemporary Finance Digest, Vol. 2, No. 1 (Spring 1998), pp. 5-30, at §7.1 at pp. 19-21.

[34] This is not an exhaustive list of all the information gathered during the book-building process.

C. The Application of Regulation M to Book-building Activities

While we recognize the importance of the book-building process in obtaining and assessing demand for an offering and in pricing the securities, we remind market participants that there is no "book-building exception" to Regulation M for inducing or attempting to induce aftermarket bids or purchases.[35] Although a distribution participant's obtaining and assessing information about demand for an offering during the book-building process would not, by itself, constitute an inducement or attempt to induce, accompanying conduct or communications, including one or more of the activities described below, may cause the collection of information to be part of conduct that violates Regulation M.

Underwriters and other distribution participants must take care that their activities do not cross the line into prohibited attempts to induce aftermarket bids or purchases by prospective investors or others. Regulation M's proscription of attempts to induce bids and purchases "covers activity that causes or is likely to cause another person to bid for or purchase covered securities."[36] The determination as to whether an activity or communication constitutes legitimate book-building or an attempt to induce a bid or purchase in violation of Regulation M depends on the particular facts and circumstances surrounding such activity or communication.

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[35] The exception in Rule 101(b)(9) of Regulation M for offers to sell or the solicitation of offers to buy the security being distributed does not extend to inducements or attempts to induce bids or purchases in the aftermarket while the distribution is occurring.

[36] Regulation M Concept Release, 59 FR at 21687.

D. Prohibited Attempts to Induce

As we previously stated, the purpose of this release is to provide guidance under Regulation M with respect to book-building and the process for allocating shares in IPOs. The activities we emphasize are prohibited do not represent an exhaustive list of conduct that violates Regulation M because the facts and circumstances of particular communications or activities will determine whether there is a Regulation M violation. This release is a reminder that certain conduct that causes or is likely to cause an undertaking, a promise, a commitment, or an understanding on the part of a customer to make aftermarket bids or purchases of an offered security, in relation to an expected allocation of IPO shares, is impermissible under Regulation M. We are not suggesting however that conduct is improper simply because it ascertains an investor's interest in purchasing an issuer's securities or leads to the development by an investor of an interest in purchasing securities of an issuer, whether in the offering or the aftermarket, including as a result of communications between the investor and a distribution participant regarding the issuer or the offering.

IV. Commission Guidance

The Commission has determined in the context of recent enforcement actions that the following activities and conduct during the Regulation M restricted period violated Regulation M:[37]

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[37] The Commission has recently brought enforcement cases alleging violations of Regulation M. *See SEC v. Morgan Stanley & Co.*, (Compl.) (2005); *SEC v. Goldman Sachs & Co.*, (Compl.) (2005); *SEC v. J.P. Morgan Securities, Inc.* (Compl.) (2003). *See also Michael J. Markowski*, *supra* note 16 and Securities Exchange Act Release No. 6536, *supra* note 3 (describing violations of Rule 10b-6, the predecessor to Regulation M).

1. *Inducements to purchase in the form of tie-in agreements*[38] *or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.*

2. *Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.* The focus of this communication is clearly to attempt to induce customers to bid for or purchase securities in the immediate aftermarket in return for an allocation. However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct.

3. *Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.*[39] Where the sales representative

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[38] In this context, tie-in agreements are agreements or contracts for the purchase of shares in the aftermarket in exchange for an allocation. Such contracts may also violate the antifraud provisions of the Securities Act of 1933 (Securities Act) and the Exchange Act, and Section 5 of the Securities Act. *See* Special Study, pt. 1, at 521 n. 93. *See also* Staff Legal Bulletin No. 10. The solicitation of a tie-in is prohibited, irrespective of whether an agreement or contract to purchase results.

[39] We note that the district court in *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497 (S.D.N.Y. Nov. 3, 2003), appeal pending, *Billing v. Credit Suisse First Boston*, Nos. 03-9284, 03-9288 (2d Cir.) stated that "inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for (cont'd)

inquires whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities, the clear expectation and understanding is that the customer will submit aftermarket orders at the prices and quantities discussed if the customer receives an allocation of shares. However, inquiring as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct. Soliciting aftermarket interest from customers that the distribution participant knows, or should know, have no interest in long-term holdings of the stock of IPO companies, may show that the firm or salesperson was attempting to induce aftermarket activity.

4. *Proposing aftermarket prices to customers or encouraging customers who provide aftermarket interest to increase the prices that they are willing to place orders in the immediate aftermarket.* Proposing aftermarket prices to customers creates the impression of a strong offering demand and a scarcity of offering shares, which can facilitate a distribution. Encouraging customers who provide aftermarket interest to increase the price level at which they were willing to place orders

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the shares" are actions that are "expressly permitted during the 'road show' period." *Id.* at 508. However, no provision of the federal securities laws expressly permits the conduct described in the quotations during the "road show" period. In fact, depending on the facts and circumstances, if the "road show" period overlaps with a restricted period defined in Regulation M, then such actions may represent attempts to induce aftermarket bids or purchases in violation of Rule 101 of Regulation M.

in the aftermarket conveys to customers that bidding for or purchasing in the immediate aftermarket at price levels higher than their own initial price level or higher than other customers' aftermarket price levels is expected in consideration for an allocation or an improved allocation in the IPO. Communication to customers of information obtained from third parties regarding their valuation of an issuer or the offering price is not violative where the conduct would not be likely to cause the customer to express an interest in paying a higher price in the immediate aftermarket. Encouraging an increase in prices, including by communication of prices of aftermarket interest of third parties would be viewed as improperly conveying to a customer that a commitment in the aftermarket at higher price levels is expected as described above.

5. *Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.* By seeking this type of aftermarket interest from customers, the underwriter would be attempting to induce customers to place orders or buy in the aftermarket. In contrast, it is possible that a customer could express a desire to purchase in the aftermarket without prompting from the salesman. Where the customer's statement is spontaneous, there may be no "attempt to induce" by the salesperson. However, if, for example, there had been a prior course of dealing between the firm and the investor through which the firm communicated that the investor was expected to provide this type of aftermarket price and quantity information, the seemingly spontaneous statement of an intention to make aftermarket purchases may in fact have been

induced by the firm. In any event, whether or not the customer's statement is spontaneous, if a sales representative accepts a customer's offer to purchase shares in the immediate aftermarket that is expressly linked to the receipt of an allocation, this is a prohibited tie-in agreement and violates Regulation M.[40]

6. *Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.* If all of the IPO shares have not been distributed, an underwriter is still in a restricted period and prohibited from attempting to induce aftermarket activity.[41] By soliciting orders or rewarding customers

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[40] By accepting such a commitment, the firm also may violate Section 5 under the Securities Act. *See* Special Study, pt. 1, at 521 n 93. *See also* note 38 *supra*. In contrast, for example, where a sales representative rejects the offer to make aftermarket purchases linked to the receipt of an allocation, and informs the customer that firm policy prohibits allocations on that basis, the firm would not have engaged in activity that constitutes a prohibited tie-in agreement in violation of Regulation M, notwithstanding that the customer ultimately was allocated IPO shares.

[41] The definition of restricted period in Rule 100 of Regulation provides that a restricted period ends upon "such person's completion of participation in the distribution." In the Adopting Release the Commission stated, "[u]nder Regulation M, a person determines when its completion of participation in the distribution occurs based on the person's role in the distribution. An underwriter is deemed to have completed its participation in a distribution when its participation has been distributed . . . and after any stabilization arrangements and trading restrictions in connection with the distribution have been terminated. The definition contains a provision that an underwriter's participation is not deemed to be completed, however, if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at

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who place orders in the immediate aftermarket with additional IPO shares in the same offering, the underwriter is improperly stimulating aftermarket purchases during the restricted period.

7. *Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.* In this scenario, the broker would be inducing or attempting to induce aftermarket bids or purchases by linking an expectation of aftermarket bids or purchases to the customer's desire to receive allocations in future hot IPOs. However, determining that a customer is or may be a long-term investor in the securities of an issuer or one or more other issuers and communications with a customer in connection with that determination do not, in and of themselves, violate Regulation M, whether or not a customer engages in aftermarket bids or purchases.

Each of the above activities is an improper attempt to induce investors to bid for or purchase covered securities in the aftermarket in order to receive IPO allocations.[42] These solicitations or attempts to induce aimed at aftermarket transactions tend to: (1) create offering demand; (2) cause artificial aftermarket price escalation; and (3) erode market integrity. As we have stated before, when offerings are sold -

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the time of such exercise." Regulation M Adopting Release, 62 FR at 522.

[42] We note, however, that allocating offering shares in an amount less than the investor's indication of interest for shares in the offering in response to a solicitation to purchase in the offering would not, in and of itself, be considered an attempt to induce aftermarket purchases.

based upon an artificially manufactured perception of scarcity and priced on stimulated buying pressure, IPO investors are unable to evaluate the offering to determine that it has been appropriately priced.[43] Moreover, other investors who bid for or purchase shares in the aftermarket would not know that the aftermarket demand had been stimulated by the underwriters' unlawful conduct.

In addition, certain conduct occurring after the restricted period, while not of itself illegal, could be evidence that a distribution participant attempted during the restricted period to induce customers to bid for or purchase stock in the aftermarket.[44] Recent enforcement cases contain examples of such activity including: (1) follow-up solicitations for immediate aftermarket orders from customers who had provided aftermarket interest earlier; and (2) tracking or monitoring customers' aftermarket purchases to see whether they had followed through on their aftermarket interest.[45] We recognize that there are legitimate reasons to monitor customer activity.

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[43] *See* 1984 Hot Issue Report, at 37-39.

[44] As discussed above, while aftermarket transactions can serve as evidence that there had been an attempt to induce aftermarket bids or purchases, such evidence is not required to establish an attempt to induce in violation of Regulation M. Additionally, oral attempts to induce aftermarket activity can be evidenced in a variety of ways. *See, e.g., Americorp, Inc.*, Securities Exchange Act Release No. 41728 (August 11, 1999) (broker dealer representatives prepared order tickets for aftermarket orders prior to the IPO becoming effective).

[45] For example, the sales representative may call the investor when aftermarket trading begins and ask why an order had not been received from the investor; or the investor may be informed that he is being penalized for not making aftermarket purchases by being denied allocations in future IPOs.

However, tracking customer's aftermarket purchases in the first few days of trading following an IPO could be evidence supporting a claim that the customers' expressions of desire to purchase in the aftermarket were induced.

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VI. General Request for Comment

We will continue to monitor developments in IPO allocation practices. We invite anyone who is interested to submit written comments on this release. Additionally, the Commission solicits comment generally concerning underwriter conduct in connection with IPOs and other distributions. The Commission will take these comments into consideration as it considers future rulemaking.

[This Interpretive Release became effective on April 7, 2005, and appears at 70 Fed. Reg. 19672 (Apr. 13, 2005)]